APPENDIX "A".

Section 95.03, Florida Statutes, 1957. "Stipulations in contract shortening period of limitation illegal.—All provisions and stipulations contained in any contract whatever entered into after May 26, 1913, fixing the period of time in which suits may be instituted under any such contract, or upon any matter growing out of the provisions of any such contract, at a period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state, and to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section.

History.—Secs. 1, 2, Ch. 6465, 1913; R.G.S. 2391; C.G.L. 4651."

APPENDIX "B".

Ill. Rev. Stat. 1957, Ch. 73, Section 837. "(1) After the effective date of this code no policy of life insurance shall be issued or delivered in this state if it contain any of the following provisions:

(a) A provision limiting the time within which any action at law or in equity may be commenced to less than three years after the cause of action shall accrue."

APPENDIX "C"

Opinion of United States Court of Appeals for the Fifth Circuit rendered April 8, 1959.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT.

No. 17525

SUN INSURANCE OFFICE LIMITED,
Appellant,

versus

JOHN CLAY
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(April 8, 1959.)

Before RIVES and TUTTLE, Circuit Judges and SIMPSON, District Judge.

TUTTLE, Circuit Judge: This is a suit on a personal property floater policy. It was instituted in the United States District Court for the Southern District of Florida by the insured, John Clay. A jury awarded recovery in the total amount of $6,300.00, and judgment was entered accordingly. The insurer appeals, contending the district court erred in holding that the stipulation in the

policy which forbade suit unless it was instituted within twelve months next after discovery of the loss[1] was rendered void and unenforceable by Florida Revised Statute 95.03 (1957), which reads as follows:

> "Stipulations in contract shortening period of limitation illegal.—All provisions and stipulations contained in any contract whatever entered into after May 26, 1913 fixing the period of time in which suits may be instituted under any such contract, or upon any matter growing out of the provisions of any such contract at a period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state, and to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section."

We agree with appellant's contention as to this defense, and therefore we do not reach its other contentions.

The policy was issued and delivered to appellee on April 22, 1952, in Chicago, Illinois. At that time appellee was a citizen of and resided in the state of Illinois. He paid the premium in a lump sum in Chicago when he received the policy. Subsequently, in July 1952, appellee moved to Florida. He purchased a ranch near Lake Harbor, Florida, in July or August 1952 and became a resident of Florida from that time on. In December, 1954

1. "Suit Clause:—No suit, action or proceeding for the recovery of any claim under this Policy shall be sustainable in any court of law or equity unless the same be commenced within twelve (12) months next after discovery by the Assured of the occurrence which gives rise to the claim. Provided, however, that if by the laws of the state within which this Policy is issued such limitation is invalid, then any such claims shall be void unless such action, suit or proceeding be commenced within the shortest limit of time permitted by the laws of such state to be fixed herein."

and January, 1955, while he was living at the ranch near Lake Harbor, certain of his insured personal property was destroyed by vandalism and other insured property was stolen. Appellee notified appellant of his losses on February 1, 1955. After investigating the claim, appellant denied liability on April 6, 1955. Suit was not instituted until May 20, 1957.

Under the terms of the "Suit Clause" this suit was barred because of appellee's failure to institute it within twelve months next after he had discovered the losses. According to the law of Illinois, such a contractual provision was and is valid and enforceable.[2]

This insurance policy was issued and delivered in Illinois to a citizen of that state, and it was paid for by him while he was present and residing in that state. It insured the appellee's personal property which was at that time presumably in the same state. According to the law of Florida, it was therefore an Illinois contract, the validity and interpretation of which would ordinarily be determined by the law of Illinois. *Connor* v. *Elliott*, 79 Fla. 513, 85 So. 164, cert. dismissed, 254 U.S. 665. Since the law of Illinois validates clauses limiting the time within which suit may be brought, this clause presents a good defense to appellee's suit unless the Florida statute renders in unenforceable in any Florida court.

This presents a question which substantially affects the outcome of this suit, and since federal jurisdiction in this case is based on diversity of citizenship, we must apply the law which the state courts of the forum would

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2. *Trichelle* v. *Sherman & Ellis, Inc.*, 259 Ill. App. 346; *Hartzell* v. *Maryland Cas. Co.*, 163 Ill. App. 221; see also Smith-Hurd Ann. St., Ch. 73, §969a(1)(k) (1958); cf. Smith-Hurd Ann. St., Ch. 73, §§ 837(1)(a), 903(1)(a) (1958).

apply (*Guaranty Trust Co.* v. *York*, 326 U.S. 99; *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487), insofar as the state law does not violate the constitution of the United States. See *Sampson* v. *Channell*, 1 Cir., 110 F.2d 754, cert. denied 310 U.S. 650.

The wording of the Florida statute is quite general and broad, and it appears to apply to all contracts, wherever made or performed, which happen to be sued upon in the courts of Florida. However, there are no reported instances where this statute has been applied under circumstances similar to those presented here; and the jurisprudence of Florida gives us reason to believe that the Florida state courts would construe it as being inapplicable under these circumstances.

The following representative decisions demonstrate the Florida courts' tendency, based on their interpretation of the requirements of due process and their recognition of the general common law rules of comity, to refrain from attempting to apply Florida statutes or their own notions of public policy to foreign contracts which are valid where entered into: *Connor* v. *Elliott, supra; Sovereign Camp, Woodmen of the World* v. *Mixon*, 79 Fla. 420, 84 So. 171; *Equitable Life Assur. Soc. of U.S.A.* v. *McRee*, 75 Fla. 257, 78 So. 22; *American Fire Ins. Co.* v. *King Lumber & Mfg. Co.*, 74 Fla. 130, 77 So. 168, aff'd., 250 U.S. 2.

It is thus quite possible that the Florida state courts would reach the same conclusion that the Kentucky court reached in *Union Cent. Life Ins. Co.* v. *Barnes*, 175 Ky. 364, 194 S.W. 339[3]—that the validity of a contractual provision limiting the time within which suit can be brought is to be determined by the *lex locus contractu*

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3. See also *Brooks* v. *Travelers' Protective Ass'n of America*, E.D. N.Y., 47 F.2d 618.

rather than the *lex fori*. This result could be expected if the court did not fall into the Alabama Supreme Court's error[4] of assuming that the issue presented concerned the choice of the applicable statute of limitations rather than the choice of the substantive law governing the validity of the contract itself.[5]

We are not obliged, however, to make the difficult guess as to what the Florida state courts might decide if they were presented with this issue, for we conclude that there is only one possible decision which would be consonant with due process of law:[6] to deny application of the Florida statute to this contract.

Examining the decisions of the Supreme Court of the United States on this subject, we find none which involves the identical circumstances presented here, but we find several which present very similar facts and which, we feel, clearly and unmistakably point out the result which must be reached in this case.

The case of *Home Insurance Co.* v. *Dick, supra*, involved a contract of marine insurance issued and paid for in Mexico and insuring a vessel which was never inside the state of Texas, the state in which suit on the policy was brought. The original insurance was payable in Mexico. After this insurance was issued, the risk was reinsured (outside of Texas) by a New York insurer which was qualified to do

4. *Gulliher* v. *State Mutual Life Ins. Co.*, 150 Ala. 543, 43 So. 833.

5. See *Union Central Life Ins. Co.* v. *Barnes*, 175 Ky. 364, 194 S.W. 339, 340; *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143, 149; cf. *Home Insurance Co.* v. *Dick*, 281 U.S. 397, 406, 409, 410.

6. Cf. *Sampson* v. *Channell*, 1 Cir., 110 F.2d 754, cert. denied 310 U.S. 650.

business in Texas. The original assured assigned the policy to a citizen of Texas who was then in Mexico and remained there until after the occurrence of the loss; after which he returned to Texas and brought an *in rem* action in Texas by garnishment proceedings directed against the domestic insurance agents. The defendants pleaded a stipulation in the policy forbidding suit except within one year next following the loss. The Texas courts denied the defendants the benefit of this stipulation. They held it was invalidated by a Texas statute outlawing such agreements. The Supreme Court of the United States reversed the Texas courts by a unanimous vote. In an opinion written by Mr. Justice Brandeis, the Court stated that the statute as construed by the Texas courts deprived the defendants of property without due process of law. This statute, the Court held, increased their obligation and imposed burdens they had not contracted for; and this, the Court held, could not be done even in the name of the public policy of Texas.

This holding was followed by Judge Strum, of the District Court for the Southern District of Florida, later a member of this Court, in the case of *Holderness* v. *Hamilton Fire Ins. Co. of New York*, S.D.Fla., 54 F. Supp. 145, which involved the Florida statute we are here considering. But, appellee argues, in the Holderness case the plaintiff was a resident of the state of North Carolina, the policy was issued in North Carolina, and the building which was insured was located in North Carolina ("Holderness was nothing more than a sojourner in the State of Florida"). Thus, he contends, the Holderness decision, like the Dick decision, was dictated by a situation which is not duplicated in this case: the forum's lack of sufficient connection with the disputed contracts to warrant the invocation of the public policy of the forum.

Assuming that a state might, if its connections with a foreign contract are sufficiently great, be permitted to effectuate its own public policy by striking down an agreement which was valid where made, the question remains: are the contacts which Florida has with this contract great enough to permit this to be done in this case? These contacts consist of nothing more than the presence of the insured property and the beneficiary in the state of Florida beginning subsequent to the formation of the contract and continuing up to the time of the suit. Nothing was to be done in Florida pursuant to the insurance contract except the purely ministerial act of payment by the insurer, and that was so only because of the fortuitous circumstance of the assured's removal from Illinois to Florida. Under strikingly similar circumstances, the Supreme Court has held that the forum state did not have the right to deprive a defendant of a contractual provision limiting the time within which suit could be brought. *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land C* , 292 U.S. 143, reh. den., 292 U.S. 607.

In the Delta & Pine Land case, the contract concerned a fidelity bond by which the defendant, a Connecticut corporation, qualified to do business in Mississippi and Tennessee, had insured the plaintiff, a Mississippi corporation with its principal office in Tennessee, against loss resulting from dishonesty of its employees "in any position anywhere." The policy listed twenty-one employees who were then working in Mississippi.[7] The contract, however, was negotiated and executed in Tennessee. It contained a condition that any claim under the contract had to be made within fifteen months from the termination of the suretyship agreement. One of the employees whose acts were insured against committed defalcations in Mississippi and

7. *Watson* v. *Employers Liability Co.*, 348 U.S. 66, 77.

the insured sued the indemnitor in that state. A Mississippi statute stated that all contracts of insurance on property, lives or interests in Mississippi were deemed made in that state; another stated that the Mississippi statutory periods of limitations of actions could not be altered by private agreements. The Mississippi court, applying these statutes, struck down the aforementioned contractual condition and allowed recovery on the contract despite the plaintiff's failure to make claim within the fifteen-month period. The Supreme Court reversed in a unanimous decision.

The following language from the Supreme Court's opinion sets forth precisely the principles we must follow and the decision we must make in the present case:

> "It is urged, however, that in this case the interest insured was in Mississippi when the obligation to indemnify the appellee matured, and it was appellant's duty to make payment there; and these facts justify the state in enlarging the appellant's obligation beyond that stipulated in the bond to accord with local public policy. The liability was for the payment of money only, and was conditioned upon three events,—loss under the policy, notice to the appellant at its home office, and presentation of claim within fifteen months of the termination of the suretyship. All of these conditions were of substantial importance, all were lawful in Tennessee, and all go to the obligation of the contract. It is true the bond contemplated that the employee whose faithfulness was guaranteed might be in any state. He was in fact in Mississippi at the date of loss, as were both obligor and obligee. The contract being a Tennessee contract and lawful in that state, could Mississippi, without deprivation of due process, enlarge the appellant's obligations by reason of the state's alleged interest in the transaction? We think not. Conceding that ordinarily a state may prohibit performance within its borders even of a contract validly made elsewhere, if the performance would

violate its laws (Home Insurance Co. v. Dick, supra, p. 408), it may not on grounds of policy ignore a right which has lawfully vested elsewhere if, as here, the interest of the forum has but slight connection with the substance of the contract obligations. Here performance at most involved only the casual payment of money in Mississippi. In such a case the question ought to be regarded as a domestic one to be settled by the law of the state where the contract was made. A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment. Aetna Life Ins. Co. v. Dunken, supra; Home Insurance Co. v. Dick, supra. Cases may occur in which enforcement of a contract as made outside a state may be so repugnant to its vital interests as to justify enforcement in a different manner. Compare Bond v. Hume, 243 U.S. 15, 22. But clearly this is not such a case." 292 U.S. at 149, 150.

In accordance with the foregoing, we hold that the provision in the subject insurance policy which limits the time in which suit can be brought is a substantial property right which is protected by the Fourteenth Amendment to the Constitution, and under the circumstances of this case a violation of due process would result from the application of Florida Statute 95.03 to this provision.

As the Supreme Court observed in the Delta & Pine Land case, our conclusion that it would violate due process renders unnecessary a consideration of whether it would violate the full faith and credit or the contract clauses of the federal constitution. Extensive research, however, among the decisions of the Supreme Court and the lower federal and state courts relating to control of interstate

relations by the due process and full faith and credit clauses discloses that the Dick and Delta & Pine Land decisions have been cited many times and have never been called into question or limited by later decisions of the Supreme Court. See e.g., *Watson* v. *Employers Liability Corp.*, 348 U.S. 66, 71, 76-78; *Lauritzen* v. *Larsen*, 345 U.S. 571, 590, 591; *Order of Travelers* v. *Wolfe*, 331 U.S. 549, 608, 628; *Pink* v. *A.A.A. Highway Express*, 314 U.S. 201, 211; cf. *Hanson* v. *Deckla*, 357 U.S. 235, 254; *Hoopeston Co.* v. *Cullen*, 318 U.S. 313.

The cited cases form part of a larger body of law which has as a basic premise the principle that only where a state has significant interests involved may it impair property rights created in other states. See, e.g., *Pink* v. *A.A.A. Highway Express*, 314 U.S. 201, 209-11. A secondary principle which is also of significance here is that even though the affected interests of the state may be substantial enough to justify its refusal to give affirmative help in enforcing a foreign contract which it finds obnoxious, these interests may, on the other hand, be insufficient to justify the state's rewriting the contract, enlarging the obligation of the makers and enforcing it in a manner contrary to their undertaking. *Watson* v. *Employers Liability Corp.*, 348 U.S. 66, 76 (concurring opinion); *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143, 149, 150; *Home Insurance Co.* v. *Dick*, 281 U.S. 397, 408-10; see also *Holderness* v. *Hamilton Fire Ins. Co. of New York*, S.D.Fla., 54 F. Supp. 145.

Following the principles set out above, we hold that the district court erred in failing to sustain the appellant's defense to this suit.

The judgment of the district court is REVERSED and the case is REMANDED for entry of judgment in favor of the appellant.

RIVES, Circuit Judge, Dissenting:

The Legislature of the State of Florida has enacted that, "All provisions and stipulations contained in any contract whatever. . . fixing the period of time in which suits may be instituted under any such contract . . . , at a period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state, and to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section." Florida Statutes Annotated, §95.03. The language of that statute seems to me to leave no room for construction; it applies to "any contract whatever."

No one has attacked the validity of that statute as applied to contracts made in Florida, or can reasonably do so. Stipulations shortening the period of limitation result in the same evils and abuses whether entered into in the State of Florida or outside that State. I cannot agree that the Florida Legislature, or the courts of that State, must accord to such a stipulation contained in an ambulatory contract of insurance held by a Florida resident, but entered into in Illinois, any greater sanctity than they would accord to such a stipulation made in Florida. I think that the Florida Legislature can protect residents of that State against the application in Florida courts of stipulations shortening the period of limitation in contracts performed in Florida regardless of the place where the contracts are executed. I therefore respectfully dissent.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, United States Court of Appeals, Fifth Circuit
By Clara R. James
Deputy

New Orleans, Louisiana
August 12, 1959
(Seal)

Judgment.

Extract from the Minutes of April 8, 1959.

No. 17,525.

SUN INSURANCE OFFICE LIMITED,

versus.

JOHN CLAY.

This cause came on to be heard on the transcript of the Record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for entry of judgment in favor of the appellant;

It is further ordered and adjudged that the appellee, John Clay, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Rives, Circuit Judge, dissenting."

Order Denying Petitions for Rehearing.

Extract from the Minutes of May 28, 1959.

No. 17,525.

SUN INSURANCE OFFICE LIMITED,

versus.

JOHN CLAY.

It is ordered by the Court that the petitions for rehearing filed in the above styled numbered cause be, and the same are hereby Denied. "Rives, Circuit Judge, dissenting.

APPENDIX "D".

Contract stipulation from *Hartford Accident and Indemnity Co.* v. *Delta Pine Land Company*, 150 So. 206:

"Any claim hereunder must be duly made upon the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee, and no suit, action, or proceeding shall be brought hereunder by the employer against the surety after the expiration of twelve (12) months after the filing of proof of loss as above required, or, in case such limitation be void under the law of the place governing construction hereof then within the shortest period of limitation permitted by such law."

SUPREME COURT, U. S.

FILED

SEP 25 1959

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1959

No. 349

JOHN CLAY,

Petitioner,

—v.—

SUN INSURANCE OFFICE, LIMITED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1959

No. 349

JOHN CLAY,

Petitioner,

—v.—

SUN INSURANCE OFFICE, LIMITED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Question Presented

Where a personal property floater insurance policy is issued and delivered in Illinois to a citizen of Illinois, and, thereafter, while the policy is in force, the insured becomes a citizen of Florida and there sustains a loss, must a federal court sitting in Florida uphold a limitation contained in the contract with respect to the time to sue, which is valid under the law of Illinois, but would be invalid if governed by Florida statute?

Constitutional Provisions and Statutes Involved

The constitutional provisions involved in the case are as follows:

1. The due process clause of the Fourteenth Amendment to the Constitution of the United States which provides as follows:

"* * * nor shall any State deprive any person of life, liberty or property, without due process of law; * * *"

2. Article I, Section 10, of the Constitution of the United States which provides:

"No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *"

3. Article IV, Section 1, which provides as follows:

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State * * *"

The statute involved in this case is Section 95.03, Florida Statutes, 1957, printed in Appendix "A", on page A1 of the Petition.

Statement

On April 22, 1952 the respondent, Sun Insurance Office, Limited, a foreign corporation, through its agent in Chicago, Illinois, issued and delivered its policy of insurance to petitioner, John Clay. At the time of issuance and delivery, John Clay was a citizen of the State of Illinois, residing at 4250 Lake Shore Drive, Chicago, Illinois (R. 8 to 13, R. 35). The premium was paid in Chicago (R. 60). The policy on its face is designated

Illinois
Personal Property Floater Policy
(World Wide).

Sometime later, petitioner came to Florida and lived on his boat at various ports (R. 36), then moved to the Clewiston Inn, Clewiston, Florida (R. 37). Finally, in May, 1954, he moved to a ranch near Lake Harbor, Florida (R. 19, 37). The losses involved in this case occurred in

December, 1954 and January, 1955 on the aforesaid ranch and were caused by the deliberate acts of petitioner's wife (R. 84, 91-94), with whom he was having marital difficulties (R. 40). She burned his clothes (R. 84, 91-94) and intentionally slashed a valuable family portrait (R. 28). Other property was deliberately withheld from petitioner by his wife (R. 20, 21).

The Personal Property Floater Policy insures

> "Personal property owned, used or worn by the person in whose name this Policy is issued and members of the Assured's family of the same household, while in all situations, except as hereinafter provided."

In the subsequent divorce proceedings between petitioner and his wife, it developed that she had tried to sell some of the personal property involved in this claim (R. 54), that there was a property settlement between petitioner and his wife but that the property which she had taken was not returned to the petitioner in connection therewith (R. 53-54).

Petitioner notified the respondent of the loss on February 1, 1955 (R. 54). Respondent investigated the claim under a reservation of rights and denied liability to the petitioner on April 6, 1955 (R. 55). Suit on the policy was filed on May 20, 1957 (R. 2).

Respondent asserted two defenses:

> 1. That the policy sued on provides that no suit for the recovery of any claim shall be sustainable unless commenced within twelve months next after discovery by the assured of the occurrence which gives rise to the claim, and that petitioner's suit on May 20, 1957 was brought approximately two years and four months after petitioner had full knowledge of his loss.

2. That deliberate damage by petitioner's wife, and her taking property from him as an incident of marital difficulties, would not be insured under an all-risks policy issued in the name of petitioner but covering property owned, used or worn by him and members of his family of the same household.

Petitioner brought suit in the United States District Court for the Southern District of Florida. Trial was held before a jury on June 4, 1958. A verdict was rendered in favor of petitioner (R. 14) on which final judgment was filed June 14, 1958 (R. 14-15). After denial of respondent's motion for judgment *non obstante veredicto* or in the alternative, for a new trial (R. 15-16), respondent appealed to the United States Court of Appeals for the Fifth Circuit. On April 8, 1959, opinion was rendered reversing the judgment of the District Court and remanding the case for entry of judgment in favor of respondent (Appendix, p. A13 of Petition). It was held that the provision in the insurance policy limiting the time in which suit can be brought, valid in Illinois where the contract was made, is a substantial property right, and that a violation of the due process clause would result if the Florida invalidating statute were applied. Rehearing was denied by the United States Court of Appeals on May 28, 1959 (Appendix, p. A13 of Petition).

ARGUMENT

POINT I

Review is not warranted because the decision below is clearly correct and is in full accord with applicable decisions of this Court.

The determination of the United States Court of Appeals in the case at bar is in strict accord with *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143 (1934), and other decisions of this Court. There is no conflict between the Fifth Circuit and any other circuit, nor does petitioner claim that there is. *Home Insurance Co.* v. *Dick*, 281 U. S. 397 (1930), reaches the same result as the *Hartford Accident* case, as does *Holderness* v. *Hamilton Fire Ins. Co. of N. Y.*, 54 F. Supp. 145 (S. D. Fla. 1944), all based on the same principle of law. Recognizing that all of the cases have reached the same conclusion, petitioner merely argues that *Home Insurance Co.* v. *Dick, supra,* and *Holderness* v. *Hamilton Fire Ins. Co., supra,* lacked that degree of connection between the forum and the contract sued upon which is found in the case at bar. Even if that were so, no conflict warranting the granting of certiorari is suggested.

The *Delta & Pine Land Co.* case is directly in point and was so regarded by the United States Court of Appeals. The insured, then doing business in Tennessee, procured a fidelity bond from the insurer through its agency in Memphis, Tennessee. The insured later moved to Mississippi. A loss was sustained in Mississippi, resulting from thefts committed by one of the insured's employees, said thefts having taken place after removal from Tennessee to Mississippi. The policy outlawed any claim not presented to the insurer within 15 months after the termination of the suretyship. The Mississippi court held that provision to be in violation of Mississippi statute. *Hartford Accident*

& Indemnity Co. v. *Delta & Pine Land Co.*, 169 Miss. 150, 150 So. 205 (1933). On appeal to this Court judgment for the insured was unanimously reversed on the ground that the contract provision, valid where made, could not be denied effect merely because the insured had removed to another state where such provision is illegal, and the loss occurred in such other state.

The case at bar presents an exact parallel. The policy is a World Wide Personal Property Floater. Coverage is not restricted to the residence of the insured; none of the property insured has a fixed situs. A loss in Florida or in any other state is covered whether the insured has changed his residence or not. Notice to the insurer of change of residence is not required and none was given. The provision requiring that suit be brought within 12 months after discovery is valid in Illinois where the policy was issued, delivered and paid for and of which state petitioner was a resident at the time. To deprive respondent of a contract right would constitute what this Court has disapproved of as an enlargement of "the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen." *Home Insurance Co.* v. *Dick*, *supra* at 407-408.

Petitioner argues the inapplicability of *Home Insurance Co.* v. *Dick*, *supra*, and *Holderness* v. *Hamilton Fire Ins. Co. of N. Y.*, *supra*. In the *Home Insurance* case, although the suit was brought by a resident of Texas in the courts of that state, the question was determined on the basis of deprivation of defendant's contract rights without due process of law if the Texas statute invalidating the limitation of time for suit were applied. In the *Holderness* case, the principle would appear to be the same, although it is true that the policy there involved was issued in North Carolina to a North Carolina resident, insuring a building located in that state. The court held that a substantive defense under a contract valid where made cannot be de-

nied effect under the law of the forum without violating the principles of due process.

Even where a Missouri resident procured a policy in that state through the local office of the insurer located there, and thereafter made a loan on the policy by mail under circumstances which the court held to be governed by New York law, a Missouri statute providing for non-forfeiture was denied application on constitutional grounds. *New York Life Insurance Co.* v. *Dodge*, 246 U. S. 357 (1918). Under the law of New York, the forfeiture arising from non-payment of the loan was valid. Under the Missouri statute applicable to policies issued by any life insurance company authorized to do business in that state, it was invalid. The court said:

> "Under the laws of New York, where the parties made the loan agreement now before us, it was valid; also it was one which the Missouri legislature could not destroy or prevent a citizen within its borders from making beyond them by direct inhibition; and applying the principles accepted and enforced in New York L. Ins. Co. v. Head, we think the necessary conclusion is that such a contract could not be indirectly brought into subjection to statutes of the state and rendered ineffective through a license authorizing the insurance company there to do business. As construed and applied by the Springfield court of appeals, section 7897 transcends the power of the state. To hold otherwise would permit destruction of the right—often of great value—freely to borrow money upon a policy from the issuing company at its home office, and would, moreover, sanction the impairment of that liberty of contract guaranteed to all by the Fourteenth Amendment." 246 U. S. at 376-77.

Although the United States Court of Appeals for the 5th Circuit rested its conclusion in the case at bar on the due process ground and considered it unnecessary to decide whether the Florida statute would violate the full faith and credit or the contract clauses of the Constitution, it

commented that the *Dick* and *Delta & Pine Land* decisions have been cited many times and never questioned or limited by later decisions of the Supreme Court which involved the related full faith and credit principle. To refuse to apply the law of the state in which the contract is made is beyond the power of a sister state and constitutes denial of full faith and credit to the laws of such state. *John Hancock Mutual Life Ins. Co. v. Yates*, 299 U. S. 178 (1936).

POINT II

Review is not warranted because the determination below is supportable on other grounds without reaching the constitutional question posed by the petitioner.

It has been the long established policy of this Court to refrain from the determination of constitutional questions if another ground exists upon which disposition of the issue can be achieved. *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 347 (1935) (concurring opinion); *Siler v. Louisville & Nashville R. Co.*, 213 U. S. 175, 193 (1909).

While the question of the applicability of Florida Statute 95.03 to contracts made in other states has not been decided in the Florida state courts, the court below observed that the Florida courts have refrained from attempting to apply Florida statutes or public policy to contracts valid in the state where made. *Connor v. Elliott*, 79 Fla. 513, 85 So. 164, cert. dismissed, 254 U. S. 665 (1920); *Sovereign Camp, Woodmen of the World v. Mixon*, 79 Fla. 420, 84 So. 171 (1920); *Equitable Life Assur. Soc. of U. S. A. v. McRee*, 75 Fla. 257, 78 So. 22 (1918); *American Fire Ins. Co. v. King Lumber & Mfg. Co.*, 74 Fla. 130, 77 So. 168 (1917), aff'd 250 U. S. 2 (1919).

Under the law of Florida, the policy sued on is governed by Illinois law. The contractual limitation on the time to sue is valid in Illinois. *Trichelle* v. *Sherman & Ellis, Inc.*, 259 Ill. App. 346 (1930); *Hartzell* v. *Maryland Casualty Co.*, 163 Ill. App. 221 (1911).

Since under the law of the forum the Florida statute is inapplicable, the constitutional question of whether it may be validly applied to destroy the suit provision need not be reached and hence this court should decline to grant certiorari.

POINT III

Review is not warranted since a judgment for the respondent is supportable because of lack of coverage under the policy.

Having upheld the defense based on the limitation of time to sue, the court below did not reach the question of whether the insurer could be held liable for deliberate acts of the named insured's wife. A finding of non-liability under the policy would render it unnecessary to determine the constitutional questions applicable to the one-year suit clause.

Research has disclosed no previous attempt by a husband to impose liability on an insurer, under a policy insuring the property of both, for deliberate damage done by the wife as an incident of marital discord. An all-risks policy of insurance is designed to protect against violence of the elements, deprivation by thieves and marauders, and loss or damage inadvertently caused. To extend the concept of risk to include the consequences of family quarrels between husband and wife, granting to one insured a right of reimbursement for damage spitefully done by a spouse, who is also insured, and a right to recover for property taken by the wife in anticipation of divorce, does

violence to every principle of public policy and insurance doctrine.

The court below did not decide the question. It is submitted that judgment for the respondent on that ground would be supportable and that the question posed by petitioner would not require decision.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 24, 1959.

Office-Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 349.

JOHN CLAY, *Petitioner*,

vs.

SUN INSURANCE OFFICE, LIMITED, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF OF PETITIONER TO RESPONDENT'S BRIEF IN OPPOSITION.

QUESTION PRESENTED.

Where a personal property floater insurance policy is issued and delivered in Illinois to a citizen of Illino., and, thereafter, while the policy is in force, the insured becomes a citizen of Florida and there sustains a loss, must a federal court sitting in Florida uphold a limitation contained in the contract with respect to the time to sue, which is valid under the law of Illinois but would be invalid if governed by Florida statute?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The constitutional provisions involved in the case are as follows:

1. The due process clause of the Fourteenth Amendment to the Constitution of the United States which provides as follows:

> "* * * nor shall any State deprive any person of life, liberty or property, without due process of law; * * *"

2. Article I, Section 10, of the Constitution of the United States which provides:

> "No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *"

3. Article IV, Section 1, which provides as follows:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State * * *"

The statute involved in this case is Section 95.03, Florida Statutes, 1957, printed in Appendix "A", on page A 1 of the Petition.

STATEMENT.

The statement of the case is substantially correct. However, the respondent in its brief implies that a property settlement was made between the petitioner and his wife, either preceding or during the divorce proceedings. The records do not bear out the statement of the respondent (R. 53-54). The only reference in the records to a property settlement was a question by the attorney for the defendant in the lower court: "Was there actually any property settlement whereby you were to get certain property and she was to get certain property?" The answer was "Yes" (R. 53). However, it should be observed that there is no reference in the record to the property involved in the suit having been the object of a settlement either between the parties or ordered by the lower court. Actually the reference to a settlement referred to certain oil leases located in the State of Indiana (R. 56). There was no property settlement as the term is generally used in connection with divorce proceedings.

The respondent asserted the two defenses set out in the statement of the case in the brief.

Petitioner brought suit in the United States District Court for the Southern District of Florida and respondent filed its answer. Subsequent thereto a motion for judgment *non obstante veredicto* or in the alternative for a new trial was filed in the District Court. The same questions were raised in the motion (R. 15-16) as those raised in the respondent's brief and the District Court denied all post trial motions and appeal followed (R. 17).

ARGUMENT.

POINT I.

Review Is Warranted Because the Decision Below Is Clearly Correct and Is Not in Full Accord with the Applicable Decisions of This Court.

The respondent in argument in its reply brief has done nothing more than rehash the arguments contained in the brief of the appellant in the Circuit Court. The cases cited, to wit: *Hartford Accident & Indemnity Company* v. *Delta & Pine Land Company*, 292 U.S. 143 (1934), *Home Insurance Company* v. *Dick*, 281 U.S. 397 (1930), and *Holderness* v. *Hamilton Fire Insurance Company of New York*, 54 Fed. Supp. 145 (S.D. Fla. 1944), are not based on the same principle of law as the case at bar.

The *Delta & Pine Land Company case* being the case most prominent in effecting the decision of the Fifth Circuit is not even remotely on point with the case at bar. The decision of the court in the *Delta & Pine Land Company case* did not deal with a statute similar to the Florida statute, making it against public policy in the State of Florida to insert in a contract a provision which attempts to shorten the statute of limitations of the State of Florida. The decision of the *Delta & Pine Land case* was based upon the failure of the insured to report to the insurer a loss within 15 months after the termination of the suretyship. There is no claim by the respondent that a report of losses under the policy sued upon was not made in accordance with the terms of the policy. There is no law in the State of Florida, or for that matter in the State of Mississippi, which declares it against public policy for a contract of insurance to contain a clause in reference to the time for

reporting a loss under an insurance policy. The statute of the State of Florida which is at issue is a statute referring entirely to the shortening of the period of limitations for actually commencing a suit. The same law is applicable to the State of Mississippi. There is nothing in the records in the *Delta & Pine Land case* which would lead one to believe that the decision of the Court of Appeals would have upheld the Mississippi court if the suit had been based entirely upon that part of the contract attempting to shorten the period of limitation under the Mississippi law. The *Delta & Pine Land case*, therefore, is not directly in point, nor could the United States Court of Appeals consider it directly in point with the case at bar.

The only case directly in point with the case at bar was before the Supreme Court of Alabama. The State of Alabama has a law similar to that of the State of Florida, to wit: Alabama Code of 1896, paragraph 2802 (App. A). In the case of *Gallaher* v. *State Mutual Life Insurance Company*, 150 Ala. 543, 43 So. 833, the Supreme Court of Alabama held that the law of the forum controlled in a suit similar to the case at bar. In the Gallaher case the contract of insurance had been entered into in the State of Georgia and the insured parties had removed themselves to the State of Alabama and the question of damages involved in the suit occurred in the State of Alabama. The Alabama court held in the Gallaher case that the *lex loci contractu* must govern as to the validity, interpretation and construction of the contract but the remedy to enforce it or to recover damages must be pursued according to the law of the forum where the suit is brought. The Alabama court further stated that where the law of another state is relied on as a defense to a suit brought in this state it must be shown that ac-

cording to the *lex loci contractus* the contract was invalid or, if once valid, that it has become extinguished and therefore is not in legal contemplation a contract. If the foreign law does not affect the contract itself but only the remedy to enforce it, it cannot be regarded and all remedies on contracts whether made in or out of the state must be governed by the laws when the suit is brought without regard to the remedies afforded by the laws of other countries.

In reply to the Alabama suit the Circuit Court took the position that the Alabama Supreme Court assumed that the issue presented concerned the choice of the applicable statute of limitations rather than the choice of the substantive law governing the validity of the contract itself and even went so far as to say that possibly the Florida courts would reach the same conclusion that the Kentucky court reached in *Union Central Life Insurance Company* v. *Barnes*, 175 Ky. 364, 194 S.W. 339. The State of Kentucky has no law similar to the law of the State of Florida or the law of the State of Alabama. The court seems to have gone quite far afield assuming that the courts of the State of Florida would take a position contrary to the law of the State of Florida.

In the case of *Leroy* v. *Crowninshield*, 2 Mason (U.S. 157 Fed. Case 8269), Judge Story after an elaborate examination of a question similar to that of the case at bar held that the statute of limitations of New York was no defense. In a suit brought in Massachusetts in the case of *Medbury* v. *Hopkins*, 3 Conn. 472, the Court held it was well settled that contracts would be construed according to the law of the place in reference to which they were made, but that the *lex loci* was applicable only as in the validity and interpretation of the contract as to time, mode, or extent

of the remedy and upon that principle, the court held that the statute of New York was no defense. In the case of *Lincoln* v. *Battele*, 6 Wendell 475, in a case dealing with the statute of limitations, Chief Justice Savage, in delivering the opinion, said the distincton between the *lex loci* and the *lex fori* is well settled. The laws of the *lex loci* are to govern all questions affecting the validity, nature and construction of the contract but the law of the place where the contract is sought to be enforced must govern as to the remedy.

POINT II.

Review Is Warranted Because the Determination Below Is Materially Based on a Constitutional Question.

Although the applicability of Section 95.03, Florida Statutes, to contracts made in other states, has not been decided in the Florida courts, the court below failed to distinguish between the pronouncements of the Florida courts as to the application of Florida statutes or public policy to contracts valid in the state where made which dealt with contracts other than insurance and contracts of insurance.

The respondent cited certain cases where it claims the Florida courts have refrained from attempting to apply Florida statutes of public policy to contracts valid in the state where made, to wit: *Connor* v. *Elliott*, 79 Fla. 513, 85 So. 164, cert. dismissed 254 U.S. 665 (1920); *Sovereign Camp, Woodmen of the World*, v. *Mixon*, 79 Fla. 420, 84 So. 171 (1920); *Equitable Life Assur. Soc. of U.S.A.* v. *McRee*, 75 Fla. 257, 78 So. 22 (1918); *American Fire Ins. Co.* v. *King Lumber & Mfg. Co.*, 74 Fla. 130, 77 So. 168 (1917), aff'd 250 U.S. 2 (1919).

With the exception of *Sovereign Camp, Woodmen of the World, case,* these cases deal with the substantive law. The *Sovereign Camp, Woodmen of the World, case,* while dealing with Section 95.03, Florida Statutes, is not remotely on point with the case at bar since it refers to a case where the policy was written in Florida by a Florida Agent for a Florida resident. This case simply confirms the constitutionality of Section 95.03, Florida Statutes. In no part of its opinion does the Court refer to the application of the Florida statutes to contracts valid in the state where made.

The *Connor* v. *Elliott case* deals entirely with real property and the Florida court held that contracts dealing with real estate or immovable property are subject to the law of the location of the property.

In the case at bar the interests of the State of Florida are superior to any other state because under the terms of the contract, worldwide floater insurance policy, Florida became the place of performance of the contract, the place in which the loss occurred, and the state of the policyholder's domicile at the time of the loss. The insurance company was legally admitted to do business in the State of Florida, was regulated in its business by Florida and notice of loss was filed with the insurance company in Florida. The remedy under the policy could only be brought in Florida and the contract provision for the time of commencing suit on the contract of insurance involved in this case relates to the procedure to be followed in perfecting a claim of loss as distinguished from the substantive contract provisions relating to the coverage and policy limits.

Contracts of insurance are a type of commercial transaction affected with great public interest, easily distinguished from contracts relating to property generally.

POINT III.

Review Is Warranted Since a Judgment for the Petitioner Is Supportable under the Florida Law.

The respondent in its brief takes the position that the lower court would have inevitably entered a finding of non-liability under the policy sued upon if it had been unnecesary to determine the constitutional questions applicable to the one-year suit clause.

The respondent has taken the position that a personal property floater (worldwide insurance policy) is an "Inland Marine Policy". The term "Inland Marine Policy" is a fiction of the insurance profession. The principal reason for purchasing an insurance contract of the sort described in the policy upon which suit was originally brought is to protect personal property of the insured against theft and malicious destruction wherever the same may be located in the World; regardless of who is guilty of the theft or the act of malicious destruction.

The case at bar is for the recovery of money due the insured under the policy for property stolen from the insured by his wife, of property wantonly destroyed by her. The Florida Supreme Court recognized that a husband may steal from his wife or a wife from her husband. *State* v. *Herndon*, 158 Fla. 115, 27 So.2d 833. The Court in the *Herndon case* held: "* * * it is not to be inferred from what has been said that in every case in which one spouse appropriates the property or funds of the other may be classified as larceny * * * The element of intent must be one of the controlling factors in determining larceny. Here as elsewhere funds of one spouse used by the other to purchase food and clothing or family necessities would not be construed as larceny, but here the charge is for appropriating $5,000 of the wife's money. In the state

of the law pointed out here we think it necessarily follows that even spouses must observe the difference between mine and thine and if they fail they do so at their peril."

The District Court recognized in the case at bar that under the law of Florida a wife can, in instances where a wrongful intent is shown, steal from the husband and so charge the jury (R. 99-100) and the jury, having taken into consideration the charge of the court and the circumstances presented by the evidence, held that the case at bar met the requirements to the extent that larceny had been proven and so returned a verdict against the respondent.

In view of the above-cited case, it is submitted that the District Court would have had to utterly disregard the law of the State of Florida and the findings of the Florida Supreme Court in order to have been able to support its findings because of a lack of coverage under the policy.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

(2) Alabama Code of 1896, paragraph 2802: "Any agreement or stipulation, verbal or written, whereby the time for the bringing of any action is limited to a time less than that prescribed by law for bringing of such action, is void."

CERTIFICATE OF SERVICE.

The undersigned of counsel for petitioner hereby certifies that a true and correct copy of the foregoing Reply Brief of Petitioner to Respondent's Brief in Opposition has been served on Joe C. Brannen, Esq., Wicker & Smith, 505-6 Ainsley Building, Miami, Florida, counsel for the respondent, by depositing the same in a United States post office, with air mail postage prepaid, in strict accordance with Rule 33 of the Revised Rules of the Supreme Court of the United States, effective July 1, 1954.

This 7th day of October, 1959.

.....

W. TERRY GIBSON,

Of Counsel for Petitioner.

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JAN 14 1960
JAMES R. BROWNING, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 349.

JOHN CLAY,
Petitioner,

vs.

SUN INSURANCE OFFICE, LIMITED,
Respondent.

BRIEF OF PETITIONER AFTER GRANTING OF WRIT OF CERTIORARI.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 349.

JOHN CLAY,
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vs.

SUN INSURANCE OFFICE, LIMITED,
Respondent.

BRIEF OF PETITIONER AFTER GRANTING OF WRIT OF CERTIORARI.

OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the 5th Circuit (R. 28-37) is reported in 265 F.2d 522.

Petition of petitioner for rehearing filed May 12, 1959 (R. 38-39), and petition of State of Florida for rehearing filed May 12, 1959 (R. 40-41), was denied by "Minute entry of order denying petitions for rehearing May 28, 1959 (R. 42)."

The jurisdiction of this court is invoked under 28 U.S.C., Section 1254 (1), and order allowing certiorari dated October 26, 1959 (R. 42).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The constitutional provisions involved in the case are as follows:

1. The due process clause of the Fourteenth Amendment to the Constitution of the United States which provides as follows:

> "* * * nor shall any State deprive any person of life, liberty or property, without due process of law; * * *."

2. Article I, Section 10, of the Constitution of the United States which provides:

> "No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *."

3. Article IV, Section 1, of the Constitution of the United States which provides as follows:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State * * *."

The Statute involved in this case is Section 95.03, Florida Statutes 1957, which provides as follows:

> "Stipulations in contract shortening period of limitation illegal.—All provisions and stipulations contained in any contract whatever entered into after May 26, 1913, fixing the period of time in which suits may be instituted under any such contract, or upon any matter growing out of the provisions of any such contract, at a period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state, and to be illegal and void. No

court in this state shall give effect to any provision or stipulation of the character mentioned in this section."

Alabama Code 1896, paragraph 2802. "Any agreement or stipulation verbal or written, whereby the time for the bringing of any action is limited to a time less than that prescribed by law for the bringing of such action is void."

QUESTION PRESENTED FOR REVIEW.

"Should a federal court sitting in Florida recognize a 'suit clause' contained in a personal property insurance policy issued in Illinois but under which loss occurred in Florida, the insured at the time of the loss being a resident of the State of Florida? All of the property for which the claim was made having been located in the State of Florida and the insurer being admitted to do business in Florida?"

STATEMENT OF THE CASE.

On May 20, 1957, a complaint was filed in the United States District Court of the Southern District of Florida, Miami Division, by the petitioner, John Clay, against the respondent, Sun Insurance Office, Limited, seeking to recover $13,500, claimed as damages for loss of personal property under personal property floater policy issued to the petitioner by the respondent on April 22, 1952 (R. 1, 2).

The jurisdiction of the District Court was invoked because of the diversity of citizenship of the parties to the suit and the fact that the amount in controversy exceeded,

exclusive of interest and cost, the sum of $3,000. Service was had upon the respondent and answer to the complaint was filed on June 12, 1957 (R. 2, 3, 4).

In the answer by way of affirmative defense the respondent raised the question of the "suit clause" contained in the policy (R. 3, 4). The suit was tried before a jury in West Palm Beach, Florida, on June 4, 1958, and a verdict was entered in favor of the petitioner in the sum of $6,800 (R. 6). The final judgment was filed June 4, 1958, in accordance with the verdict of the jury (R. 6). At the time of the trial the original insurance policy was offered and received in evidence as Plaintiff's Exhibit 1 (R. 5); offer and acceptance of Exhibit in evidence (R. 10). On June 12, 1958, the respondent filed motion for judgment *non obstante veredicto* or in the alternative for a new trial (R. 7-8). Paragraph 7 of the motion dealt with the question presented in this petition (R. 7). The matter was heard by the United States District Court on July 15, 1958, and an order denying the motion and setting a supersedeas bond was entered on the same date (R. 8). Notice of appeal was then filed on August 8, 1958 (R. 8). Thereafter briefs were filed by the appellant and the appellee in the lower court and the matter was argued before the United States Court of Appeals sitting in Jacksonville, Florida, March 11, 1959. On April 8, 1959, the United States Court of Appeals for the 5th Circuit rendered its opinion reversing the judgment of the District Court and remanding the case for entry of judgment in favor of the appellant (R. 37-38). On April 21, 1959, the petitioner filed his motion for an extension of time to file for rehearing and briefs (R. 38-39) and on April 23, 1959, an extension of 20 days was granted from April 29, 1959, together with an extension of time for the Attorney General of the State of Florida to file motion for rehearing and brief as *amicus curiae* on behalf of

the State of Florida (R. 40-41). Briefs by the Attorney General of the State of Florida were subsequently filed and on May 28, 1959, the United States Court of Appeals entered its order denying the petition for rehearing (R. 42). No opinion was rendered in connection with the order denying rehearing. Petition for certiorari was filed by the petitioner and on October 26, 1959, an order was entered by this court allowing the certiorari (R. 42). Judge Rives of the Circuit Court of Appeals dissented in the judgment of April 8, 1959 (R. 38), and in the refusal of the Circuit Court to grant the petition for rehearing (R. 42).

John Clay, the petitioner, purchased the insurance policy Plaintiff's Exhibit 1 (R. 5) through the respondent's agent, Bartholomay & Clarkson of Chicago on April 22, 1952, being then a resident of the State of Illinois (R. 14). The petitioner removed himself and family and the personal property covered by the policy to the State of Florida soon after the policy was issued in 1952 (R. 14) and at the time of the trial had been a resident and citizen of Florida since 1952 (R. 14).

In the latter part of 1954 and the early part of 1955, the petitioner was living with his family on a ranch in Lake Harbor, Florida (R. 9), and certain personal effects covered by the policy were located in the dwelling house at the Lake Harbor address during the latter part of 1954 and early part of 1955 (R. 10). In December, 1954, and January, 1955, articles, the value of which recovery was sought in the original suit, disappeared from the dwelling at Lake Harbor, Florida (R. 10-11), and in addition to the personal property removed from the house, certain personal property was destroyed (R. 11, 12, 13, 14). The Judge charged the jury that the policy covered vandalism, malicious mischief and losses of the type described in the testi-

mony and defined larceny under the Florida law (R. 25). The jury brought in its verdict granting the petitioner damages in the sum of $6,800 based upon the evidence presented at the trial (R. 6).

ARGUMENT.

Along with many of its sister states (Carnahan, Conflict of Laws and Life Insurance Contracts (1958), paragraph 137, page 657, 7 Couch on Insurance, paragraph 1629, page 5704), the State of Florida has by statute undertaken to forestall the insertion in insurance policies of stipulations for the bringing of suit within a limited time. Florida's statute declares stipulations in contracts to be "illegal and void" and provides that "No court in this state shall give effect to any provision or stipulation of the character mentioned in this section." (95.03, Florida Statutes 1957, See Constitutional Provisions and Statutes Involved).

The respondent, Sun Insurance Office, Limited, which does business in both Illinois and Florida, in an attempt to derive the greatest possible advantage from the more lax laws of Illinois, placed a clause in the insurance contract which in effect attempts to prohibit the institution of a suit, action or proceedings for recovery under the policy, unless the same be commenced within 12 months next after discovery by the assured of the occurrence which gives rise to the claim (R. 3) also (R. 5, Plaintiff's Exhibit 1).

The general rule in reference to the inclusion in insurance policies of such provisions is stated in 29 Am. Jur. (Insurance, paragraph 1394), page 1041, as follows: "• • • Where the statutes of the forum make void all agreements whereby the time for the bringing of actions is fixed at

a period less than that prescribed by law, a contractual stipulation made in another jurisdiction is not available as a defense."

This proposition is supported in various state courts by the following decisions: *Galliher* v. *State Mutual Life Insurance Co.*, 150 Ala. 543, 43 So. 833 (1907); *Asel* v. *Order of United Commercial Travelers*, 197 S.W.2d 639 (Mo. 1946); *Gulf Insurance Co.* v. *Holland Construction Co.*, 236 S.W.2d 1003 (Ark. 1951); contra: *Union Central Life Insurance Co.* v. *Barnes*, 175 Ky. 364, 194 S.W. 339 (1917) (no statute involved).

The court in its decision of April 8, 1959, in which it held that a violation of due process would result if Section 95.03, Florida Statutes 1957, were applied to the insurance contract in question relied upon *Home Insurance Company* v. *Dick*, 281 U.S. 397 (1929); *Holderness* v. *Hamilton Fire Insurance Company of New York*, 54 F. Supp. 145 (S.D. Fla. 1944); *Hartford Accident and Indemnity Company* v. *Delta Pine Land Company*, 292 U.S. 143 (1933).

However, none of the above 3 cases take the arbitrary position that the place of contracting necessarily and in all circumstances controls the validity of stipulations as to the time within which suit must be brought. In each of these cases the court takes the position that on the particular facts of that case sufficient connections were lacking between the state of the forum and the contract to justify the forum imposing its public policy considerations upon the contract. Each of these cases is clearly distinguishable from the case at bar.

In the case of *Home Insurance Company* v. *Dick*, *supra*, the forum had no connections whatsoever with the contract. The contract was made in another jurisdiction, the

loss occurred in another jurisdiction and the risk under the insurance policy was never within the jurisdiction of the forum. In the *Holderness* case, *supra*, the forum was merely the place in which the suit happened to have been instituted. Holderness was a sojourner in the State of Florida and merely used the forum as a convenience. The insurance policy was entered into in North Carolina, the property insured was situated in North Carolina and the loss occurred in North Carolina.

In the case at bar, however, throughout substantially all of the contract period, the property insured was in the State of Florida. The loss of the property occurred in Florida and consequently the cause of action arose in that state. Florida was therefore, the "natural" or "normal" forum. In addition the insured was a *bona fide* resident of Florida at the time the cause of action arose and at that time the insurer was admitted to do business in Florida. The only connection of the State of Illinois with the contract was that the contract was issued in Illinois. If it can be asserted that there are any circumstances in which a state, other than the state in which a contract was made, has sufficient interest in the contract to impose its statutes to nullify the contract stipulation on the basis of its public policy, then the case at bar presents such situation. The insurance policy in question (R. 5, Plaintiff's Exhibit 1) is designated by the respondent, Sun Insurance Office, Limited, as an "Illinois Personal Property Floater Policy (World Wide)". By so designating the policy it is apparent that the respondent fully realizes that the individuals insured and the property insured under the policy may be located in any jurisdiction in the world. The citizenship of the insured is not considered and it can be reasonably concluded that under such a policy it would be impossible to limit the place of the forum

to the State of Illinois. The State of Florida, prior to 1913, was attracting residents from various states of the Union and it became apparent to the legislative authorities that unless they established by law the policy of the State of Florida in reference to contracts entered into in other States, that the situation would be so confusing that it would be impossible for the judiciary of the State of Florida to arrive at reasonable and uniform conclusions in matters presented where contracts from other states were involved, and where the limitations were not uniform. Consequently the Legislature in 1913 clearly stated the policy of the State of Florida toward the attempt by contracts to provide limitations contrary to the Statute of Limitations of the State of Florida. The Legislature apparently took the position in 1913 and each succeeding Legislature thereafter has affirmed that an agreement to fix a period of limitations by contract is a matter which relates to the administration of justice and is not entitled to the same protection accorded to ordinary contractual provisions (Cf. *Carbon Black Export* v. *The SS Monrosa*, 254 F.2d 297 (5th Cir. 1958), cert. denied 359 U.S. 180 (1959)).

Apparently, the *Delta Pine Land Company* case, *supra*, influenced the District Court because of the apparent similarity of the facts in that case to the facts of the case at bar. The State of Mississippi where the suit was brought has a statute similar to Section 95.03, Florida Statutes of 1957, and the cause of action apparently arose in the State of Mississippi. However, other factors in that case are not in any way similar to the facts in the case at bar. In the Delta Pine Land Company case the risk was not a risk of property loss in which there was a situs of the property—the risk was one involving the honesty of employees which employees were located in several states.

The primary difference between the Delta Pine Land Company case and the case at bar is that the former did not involve a contract stipulation involving the time within which suit must be brought; the case involved a stipulation requiring that a claim must be presented to the insurer within 15 months after the termination of the suretyship (See Appendix A). Thus the holding in the Delta Pine Land Company case cannot be considered to be a holding directly in point, as a contract stipulation regarding the time within which suit must be brought was not at issue in that case. The language in the Delta Pine Land Company case, however, is most important. The court said that the question is basically one of "the relative importance of the interest of the forum as contrasted with cause created at the place of the contract * * *." (292 U.S. 143).

In the case at bar the property insured was located in Florida throughout most of the policy period (R. 20-21). The insurer was doing business in the State of Florida during all of the policy period, the loss occurred in Florida, the investigation of the loss was made in Florida by agents of the insurance company.

A contract of insurance is not an ordinary bilateral contract. There is no "meeting of the minds" between both parties on all of the policy provisions. A contract of insurance is a contract prepared in its entirety by the insurer and is accepted by the insured. He has no control whatsoever over any of the terms of the policy. The only protection an insured has against unfair, unreasonable or improper provisions in the contract of insurance is the fact that as in the state of Florida, in most states regulation is imposed on the insurer in regard to policy forms. Such form contracts are subject to the public policy of the forum (Cf. *The Kensington*, 183 U.S. 263 (1901)).

The Court of Appeals in the case at bar discounted the interest of the State of Florida in the case at bar. It in effect held that where a state has significant interest involved it may impair property rights created in other states. It is hard to understand how a state could have more interest in a contract than the State of Florida has in the contract of insurance upon which the case at bar is based. The State of Florida was so involved in the case at bar that the right of the respondent to proceed at all in the courts of Illinois is questionable. The only forum having proper jurisdiction was some forum within the State of Florida, and bound by the public policy of the State of Florida.

The respondent was at the time of the issuance of the policy and at the time that the loss occurred under the policy, qualified under the laws of the State of Florida to transact business within the state, and therefore, was in the same position as a corporation whose charter had been issued by the State of Florida. Apparently the fact of incorporation under the laws of a given state results in a sufficient interest on the part of that state to dictate a choice of its laws, over those of a foreign forum in determining the rights of those who have contracted with the said corporation. This argument is clearly stated in *Ex rel. United Commercial Travelers* v. *Wolfe*, 331 U.S. 586 (1947). While the Wolfe case deals with a fraternal benefit society and the rights of members of a society, the same rule should be applied to the insured under a policy such as that sued upon in the case at bar.

This Court in *Pink* v. *A.A.A. Highway Express*, 314 U.S. 210 (1941), rehearing denied 314 U.S. 716 (1942), and in *Watson* v. *Employers Liability Assurance Corporation*, 348 U.S. 66 (1954), rehearing denied 348 U.S. 921 (1955), was in favor of applying the law of the forum. Ap-

parently, the Circuit Court took little notice that this Court had distinguished the Hartford case and held in favor of applying the *lex fori*. In fact, in its opinion the Circuit Court notes several cases which argue convincingly for a decision contrary to the findings of the Court. *Hoopeston Canning Co.* v. *Cullen*, 318 U.S. 313 (1943), considers the well established rule that the state has a particular interest in the insurance of property within its borders, hence its power to regulate such matters is expansive.

In *Hanson* v. *Denckla*, 357 U.S. 235 (1957), rehearing denied 358 U.S. 858 (1958), a case originating in the same jurisdiction as the case at bar, the court cast serious doubts upon the precedent value of the *Hartford* case, *supra*. In the Denckla case it appeared that there were insufficient contacts with the state of Florida to allow it to assume jurisdiction over nonresidents but unquestionably had the contacts been sufficient to sustain jurisdiction, the law of Florida could have been applied. In the case at bar all of the contacts were with the state of Florida with the exception of the delivery of the premium monies to the agent for the respondent in Chicago (R. 20-21-22).

If the interests of the forum are sufficient, neither the due process clause nor the full faith and credit clause of the federal constitution require the forum to apply the normal conflict of laws rule. It is difficult to see how the majority in the case at bar can be considered sound in light of *McGee* v. *International Life Insurance Company*, 355 U.S. 220 (1957). In the McGee case a policy of insurance was issued in Texas and mailed to California from whence the assured mailed premiums to an out-of-state office relying upon the state's interest in insurance matters and with the showing of no other connection with the state of California. The Supreme Court held that Cali-

fornia could obtain jurisdiction over the foreign corporation by substituted service. In the case at bar, the defendant obviously did business in the state, the loss occurred and was investigated in the State of Florida. It seems that the requirements of the McGee case have been met.

In the case at bar the interests of the State of Florida are superior to the interest of any other state because Florida was the place of performance of the contract; it was the place in which the cause of action arose; it was the state of the policyholder's domicile; the insurance company was subject to the regulation of its business by Florida, and finally because contracts of insurance are a type of commercial endeavor in which regulation in the public interest is essential.

The only case directly in point with the case at bar was before the Supreme Court of Alabama. The State of Alabama has a law similar to that of the State of Florida, to wit: Alabama Code of 1896, paragraph 2802 (Constitutional Provisions and Statutes Involved). In the case of *Gallaher* v. *State Mutual Life Insurance Company*, 150 Ala. 543, 43 So. 833, the Supreme Court of Alabama held that the law of the forum controlled in a suit similar to the case at bar. In the Gallaher case the contract of insurance had been entered into in the State of Georgia and the insured parties had removed themselves to the State of Alabama and the question of damages involved in the suit occurred in the State of Alabama. The Alabama court held in the Gallaher case that the *lex loci contractus* must govern as to the validity, interpretation and construction of the contract but the remedy to enforce it or to recover damages must be pursued according to the law of the forum where the suit is brought. The Alabama court

further stated that where the law of another state is relied on as a defense to a suit brought in this state it must be shown that according to the *lex loci contractus* the contract was invalid or, if once valid, that it has become extinguished and therefore is not in legal contemplation a contract. If the foreign law does not affect the contract itself but only the remedy to enforce it, it cannot be regarded and all remedies on contracts whether made in or out of the state must be governed by the laws when the suit is brought without regard to the remedies afforded by the laws of other countries.

In reply to the Alabama suit the Circuit Court took the position that the Alabama Supreme Court assumed that the issue presented concerned the choice of the applicable statute of limitations rather than the choice of the substantive law governing the validity of the contract itself and even went so far as to say that possibly the Florida courts would reach the same conclusion that the Kentucky court reached in *Union Central Life Insurance Company* v. *Barnes*, 175 Ky. 364, 194 S.W. 339. The State of Kentucky has no law similar to the law of the State of Florida or the law of the State of Alabama. The court seems to have gone quite far afield in assuming that the courts of the state of Florida would take a position contrary to the law of the state of Florida.

Although it would appear that the application of Section 95.03, Florida Statutes, to contracts made in other states has not been decided in the Florida courts, the court below failed to distinguish between the pronouncements of the Florida courts as to the application of Florida statutes on public policy to contracts valid in the state where made which dealt with contracts other than insurance and contracts of insurance. The lower court referred to certain cases, to-wit: *Connor* v. *Elliott*, 79 Fla. 513, 85 So.

164, cert. dismissed 254 U.S. 665 (1920); *Sovereign Camp, Woodmen of the World,* v. *Mixon,* 79 Fla. 420, 84 So. 171 (1920); *Equitable Life Assur. Soc. of U.S.A.* v. *McRee,* 75 Fla. 257, 78 So. 22 (1918); *American Fire Ins. Co.* v. *King Lumber & Mfg. Co.,* 74 Fla. 130, 77 So. 168 (1917), aff'd 250 U.S. 2 (1919), and accepted these cases as demonstrating the Florida court's tendency to refrain from attempting to apply Florida Statutes or the court's own notion of public policy to foreign contracts which are valid where entered into.

With the exception of Sovereign Camp, Woodmen of the World, case, these cases deal with the substantive law. The Sovereign Camp, Woodmen of the World, case, while dealing with Section 95.03, Florida Statutes, is not remotely on point with the case at bar since it refers to a case where the policy was written in Florida by a Florida agent, for a Florida resident. This case simply confirms the constitutionality of Section 95.03, Florida Statutes.

The *Connor* v. *Elliott* case deals entirely with real property and in that case the Florida court held that contracts dealing with real estate or immovable property are subject to the law of the location of the property.

It seems to be the general rule that the laws of the *lex loci* are to govern all questions affecting the validity, nature and construction of the contract but the law of the place where the contract is sought to be enforced must govern as to the remedy. *Leroy* v. *Crowninshield,* 2 Mason (U.S. 157 Fed. Case 8269), *Medbury* v. *Hopkins,* 3 Conn. 472, *Lincoln* v. *Battele,* 6 Wendell 475.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the validity of Section 95.03, Florida Statutes 1957, should be upheld and its application to the circumstances of this case by the United States District Court be confirmed; that the findings of the United States Court of Appeals for the Fifth Circuit should be reversed and the case remanded with instructions that the judgment of the District Court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

The undersigned of counsel for Petitioner certifies that a true and correct copy of the foregoing Brief of Petitioner has been served on Eugene A. Leiman, Esq., c/o Reir, Mound & Cotton, 116 John Street, New York 38, New York, attorney for Respondent, by mailing Air Mail, Special Delivery with postage prepaid, this 13th day of January, 1960.

APPENDIX A.

Contract stipulation from *Hartford Accident and Indemnity Co.* v. *Delta Pine Land Company* (150 So. 206):

"Any claim hereunder must be duly made upon the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee, and no suit, action, or proceeding shall be brought hereunder by the employer against the surety after the expiration of twelve (12) months after the filing of proof of loss as above required, or, in case such limitation be void under the law of the place governing construction hereof then within the shortest period of limitation permitted by such law."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 349

JOHN CLAY,
Petitioner,

vs.

SUN INSURANCE OFFICE LIMITED,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE STATE OF FLORIDA, AMICUS CURIAE

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BRIEF OF THE STATE OF FLORIDA, AMICUS CURIAE

STATEMENT OF THE CASE

This brief is submitted on behalf of the State of Florida as amicus curiae, by its Attorney General. It is the position of the State of Florida that the United States Court of Appeals for the Fifth Circuit's construction of Section 95.03, Florida Statutes, 1957, and the said Court's holding as to the limited applicability of said section are seriously prejudicial to the interests of the State of Florida in its attempts to regulate insurance on lives and property of citizens of Florida.

This suit was instituted by Petitioner on a contract of insurance. The respondent's defense of a policy stipu-

lation requiring suit within twelve months was rejected by the District Court on the grounds that Section 95.03, Florida Statutes, 1957, made said stipulation of no effect. Judgment was had by petitioner on the policy.

On appeal taken from judgment of the District Court, The United States Court of Appeals for the Fifth Circuit rendered its opinion reversing the judgment of the District Court and remanding the case for entry of judgment in favor of respondent. (R. 37-38.) On petition for rehearing briefs by petitioner and the Attorney General of the State of Florida as amicus curiae on behalf of the State of Florida, (R. 38-41) were filed and the United States Court of Appeals for the Fifth Circuit entered an order denying the petition for rehearing (R. 42). This court on petition for certiorari filed by the petitioner on October 26, 1959, entered an order allowing the certiorari (R. 42).

STATEMENT OF THE FACTS

In April 1952, the Petitioner purchased from an agent of the respondent in Chicago, Illinois, a policy of insurance covering the petitioner's personal property against loss during a term of three years (R. 5). The policy was to cover loss occurring anywhere in the world (R. 5). The petitioner in April 1952, was a resident of the State of Illinois (R. 14). The respondent, incorporated in Great Britain, was and is admitted to do business in the states of Illinois and Florida (R. 2).

In July 1952, petitioner moved to Florida and became a resident of that state (R. 14). The respondent's agents

were informed of petitioner's residence in Florida (R. 21). In November, December 1954, and January 1955, petitioner sustained losses to his personal property (R. 15). The losses occurred in Florida (R. 10). Suit was brought in Florida on the policy of insurance in May 1957 (R. 1).

ARGUMENT

SHOULD A FEDERAL COURT, SITTING IN FLORIDA, RECOGNIZE A "SUIT CLAUSE" CONTAINED IN A PERSONAL PROPERTY INSURANCE POLICY ISSUED IN ILLINOIS BUT UNDER WHICH LOSS OCCURRED IN FLORIDA, THE INSURED THEN BEING A RESIDENT OF FLORIDA, AND THE INSURER BEING ADMITTED TO DO BUSINESS IN FLORIDA?

Along with many of its sister states,[1] the State of Florida has by statute undertaken to forestall the insertion in insurance policies of stipulations for the bringing of suit within a limited time. Florida's statute declares stipulations in contracts to be "illegal and void" and provides that "No court in this state shall give effect to any provision or stipulation of the character mentioned in this section."[2] The Illinois statute deals only with life insurance contracts.[3]

The respondent, Sun Insurance Office, Limited, which does business in both Illinois and Florida, in an attempt

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[1]See Carnahan, *Conflict of Laws and Life Insurance Contracts* (1958) Section 137, page 657; 7 *Couch on Insurance*, Section 1629, page 5704.

[2]Section 95.03, Florida Statutes, 1957. See Appendix.

[3]Illinois Ann. Stat., 1937, Chap. 73.

to derive the greatest possible advantage from the more lax laws of Illinois, placed in the insurance contract in question the following clause:

> "Suit Clause: No suit, action or proceeding for the recovery of any claim under this Policy shall be sustainable in any court of law or equity unless the same be commenced within twelve (12) months next after discovery by the Assured of the occurrence which gives rise to the claim. Provided, however, that if by the laws of the state within which this Policy is issued such limitation is invalid, then any such claims shall be void unless such action, suit or proceeding be commenced within the shortest limit of time permitted by the laws of such state to be fixed herein."

The general rule is stated in 29 Am. Jur., Insurance, Section 1394, page 1041, as follows:

> ". . . Where the statutes of the forum make void all agreements whereby the time for the bringing of actions is fixed at a period less than that prescribed by law, a contractual stipulation made in another jurisdiction is not available as a defense."

This proposition is supported by the decisions in *Galliher vs. State Mutual Life Insurance Co., 150 Ala., 543, 43 So. 833, Asel vs. Order of United Commercial Travelers* (Mo. 1946) *197 S.W. 2d 639; Gulf Insurance Co. vs. Holland Construction Co.* (Ark. 1951) *236 S.W. 2d 1003;* contra *Union Central Life Insurance Co. vs. Barnes, 175 Ky. 364, 194 S.W. 339* (no statute involved).

The court in its opinion of April 8, 1959 (R. 28), held that a violation of due process would result if Section

95.03, Florida Statutes, 1957, were applied to the insurance contract in question. In reaching this conclusion the court relied upon *Home Insurance Company vs. Dick, 281 U.S. 397; Holderness vs. Hamilton Fire Insurance Company of New York, S.D. Fla., 54 Fed. Supp. 145; Hartford Accident and Indemnity Company vs. Delta Pine Land Company, 292 U.S. 143.* None of these three cases takes the arbitrary position that the place of contracting necessarily and in all circumstances controls the validity of stipulations as to the time within which suit must be brought. In each of these cases the court takes the position that on the particular facts of that case, sufficient connections were lacking between the state of the forum and the contract to justify the forum imposing its public policy considerations upon the contract. Each of these cases is clearly distinguishable from the case at bar.

If the interests of the forum are sufficient, neither the due process clause nor the full faith and credit clause of the federal constitution require the forum to apply the normal conflict of laws rule. It is difficult to see how the majority in the case at bar can be considered sound in light of *McGee v. International Life Insurance Company, 355 U.S. 220 (1957).* In the McGee case a policy of insurance was issued in Texas and mailed to California from whence the assured mailed premiums to an out-of-state office relying upon the state's interest in insurance matters and with the showing of no other connection with the state of California. The Supreme Court held that California could obtain jurisdiction over the foreign corporation by substituted service. In the case at bar,

the defendant obviously did business in the state, the loss occurred and was investigated in the State of Florida. It seems that the requirements of the McGee case have been met.

In the case of *Home Insurance Company vs. Dick, supra,* the forum had substantially no connections with the contract whatsoever. The contract was made in another jurisdiction, the loss occurred in another jurisdiction, and the risk under the insurance policy was never within the jurisdiction of the forum. Similarly in the *Holderness Case, supra,* the forum was merely the place in which the suit happened to have been instituted. In that case the insurance policy was entered into in North Carolina, the property insured had its situs in North Carolina, and the loss occurred in North Carolina. In that case Florida was merely the forum and nothing more.

In the case at bar, however, throughout substantially all of the contract period, the property insured was in the State of Florida. The loss to the property occurred in the State of Florida and consequently the cause of action arose in that state. Florida was therefore the "natural" or "normal" forum. In addition the insured was a bona fide resident of the State of Florida at the time the cause of action arose and at that time the insurer was admitted to do business in the State of Florida. The only connection of the State of Illinois with the contract was that the contract was issued in Illinois. If it can be asserted that there are any circumstances in which a state, other than the state in which a contract was made, has sufficient interest in the contract to im-

pose its statutes to nullify a contract stipulation on the basis of its public policy, then the case at bar presents such situation.

The facts of the *Delta Pine Land Company Case, supra,* are more similar to the facts of the case at bar. In the *Delta Pine Land Company Case* the cause of action apparently arose in the State of Mississippi where the suit was brought and in which a statute similar to Section 95.03, Florida Statutes, 1957, was in existence. Certain other factors in that case, however, are not identical with the case at bar. In the *Delta Pine Land Company Case,* the risk was not a property loss in which there was a situs of the property. The risk was one involving the honesty of employees which employees were located in several states. In the case at bar the property insured had a situs in the State of Florida and the risk was all concentrated in that state. However, the primary difference between the *Delta Pine Land Company Case* and the case at bar is that the *Delta Pine Land Company Case* did not involve a contract stipulation involving the time within which suit must be brought. That case involved a stipulation[4] requiring that a claim must be presented to the insurer within fifteen months after the termination of the suretyship.

Thus the holding in the *Delta Pine Land Company Case* cannot be considered to be a holding directly in point, as a contract stipulation regarding the time within which suit must be brought was not at issue in that case. The language of that case, however, is most important.

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[4]See Appendix.

The court said that the question is basically one of "the relative importance of the interest of the forum as contrasted with those created at the place of the contract, . . ." 292 U.S. 150.

In addition to the factors in the case at bar that the property insured was located in Florida throughout most of the policy period, that the insured was a citizen of Florida throughout most of the policy period, that the insurer was admitted to do business in the State of Florida during all of the policy period, and that the loss occurred in Florida, several other factors pertaining to this particular type of contract are relevant. A contract of insurance is not an ordinary bilateral contract. There is no "meeting of the minds" between both parties on all of the policy provisions. A contract of insurance is a contract prepared in its entirety by the insurer and it is accepted by the insured. He has no control whatsoever over any of the terms of the policy. The only protection an insured has against unfair, unreasonable or improper provisions in the contract of insurance is the fact that in most states regulation is imposed on the insurer in regard to policy forms. Such form contracts are subject to the public policy of the forum. Cf. *The Kensington, 183 U.S. 263.*

A final consideration is that an agreement to fix a period of limitations by contract is a matter which relates to the administration of justice and is not entitled to the same protection according to ordinary contract provisions. Cf. *Carbon Black Export vs. The SS Monrosa (5th Cir.) 254 Fed.* 2d. 297, cert. dismissed, _____U.S. _____, 3 L. Ed. 2d. 723.

If the interests of the forum are sufficient neither the due process clause nor the full faith and credit clause of the Federal Constitution require the forum to apply the normal conflict of laws rules. Cf. *Alaska Packers Association vs. Industrial Accident Commission, 294 U.S. 532; Young vs. Masci, 289 U.S. 253; McGee v. International Life Insurance Company, 355 U.S. 220 (1957).* In the case at bar the interests of the State of Florida are superior to the interests of any other state because Florida was the place of performance of the contract, it was the place in which the cause of action arose, it was the state of the policyholder's domicile, the insurance company was subject to regulation of its business by Florida, and, finally, because contracts of insurance are a type of commercial endeavor in which regulation in the public interest is essential.

CONCLUSION

The opinion on the appeal taken from the judgment of the District Court rendered by the United States Court of Appeals for the Fifth Circuit, dated April 8, 1959, construing Section 95.03, Florida Statutes, 1957, in such manner as to limit the applicability of said section to contracts of insurance is seriously prejudicial to the interests of the State of Florida in its attempts to regulate insurance on lives and property of citizens of Florida, and should be reversed.

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APPENDIX

(1) Section 95.03, Florida Statutes, 1957:

> "*Stipulations in contract shortening period of limitation illegal.*—All provisions and stipulations contained in any contract whatever entered into after May 26, 1913, fixing the period of time in which suits may be instituted under any such contract, or upon any matter growing out of the provisions of any such contract, at a period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state, and to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section."

(2) Contract stipulation from *Hartford Accident and Indemnity Co. v. Delta Pine Land Company* (150 So. 206):

> "Any claim hereunder must be duly made upon the surety within fifteen (15) months after the termination of the suretyship for the defaulting employee, and no suit, action, or proceeding shall be brought hereunder by the employer against the surety after the expiration of twelve (12) months after the filing of proof of loss as above required, or, in case such limitation be void under the law of the place governing construction hereof then within the shortest period of limitation permitted by such law."

CERTIFICATE OF SERVICE

I, Robert J. Kelly, Assistant Attorney General of the State of Florida, do hereby certify that I have mailed true copies of this brief and appendix to Messrs. James A. Smith and Joe C. Brannen, 506 Ainsley Building, Miami, Florida, attorneys for respondent, and to Mr. Paschal C. Reese, 209 South Olive Avenue, West Palm Beach, Florida, attorney for petitioner, this _____day of January, 1960.

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Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 349

JOHN CLAY,

Petitioner,

v.

SUN INSURANCE OFFICE, LIMITED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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IN THE

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OCTOBER TERM, 1959

No. 349

JOHN CLAY,

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v.

SUN INSURANCE OFFICE, LIMITED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

Questions Presented

1. Where a personal property floater insurance policy is issued and delivered by an insurer in Illinois to a citizen of Illinois, and thereafter the insured becomes a citizen of Florida and there sustains a loss, is a federal court, sitting in Florida, required by the Constitution to uphold a provision contained in the contract with respect to the time to sue which is valid under the law of Illinois but which would be invalid if governed by a Florida statute which prohibits such limitations in general terms not specifically applicable to foreign contracts of insurance?

2. Under the law of Florida, does a general statute which in all-inclusive terms declares void contract provisions shortening the time to sue apply to a contract of insurance validly issued under the law of Illinois to a citizen of Illinois by an insurer in that state, if the insured there-

after changes his residence to Florida and there sustains a loss?

3. Does an "all risks" policy of insurance covering personal property of all members of the family of the same household insure against deliberate acts of a wife who, while a member of such household, as a result of marital discord, removes family possessions and refuses to return them, sets fire to the husband's clothing, damages his sporting equipment and slashes a family portrait?

Constitutional Provisions and Statutes Involved

The constitutional provisions involved in the case are as follows:

1. The due process clause of the Fourteenth Amendment to the Constitution of the United States which provides as follows:

> "* * * nor shall any State deprive any person of life, liberty or property, without due process of law; * * *."

2. Article I, Section 10, of the Constitution of the United States which provides:

> "No State shall * * * pass any * * * Law impairing the Obligation of Contracts * * *."

3. Article IV, Section 1, of the Constitution of the United States which provides as follows:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State * * *."

The statute involved in this case is Fla. Rev. Stat., § 95.03 (1957), which provides as follows:

> "Stipulations in contract shortening period of limitation illegal.—All provisions and stipulations

contained in any contract whatever entered into after May 26, 1913, fixing the period of time in which suits may be instituted under any such contract, or upon any matter growing out of the provisions of any such contract, at a period of time less than that provided by the statute of limitations of this state, are hereby declared to be contrary to the public policy of this state, and to be illegal and void. No court in this state shall give effect to any provision or stipulation of the character mentioned in this section."

Statement

Respondent Sun Insurance Office, Limited, a British company doing business in New York, Maryland, Massachusetts, Illinois, Ohio, Texas, California, Louisiana, Pennsylvania, Washington and Florida (Pl. Ex. 1, R. 5, fol. 11), issued and delivered its policy of insurance to petitioner John Clay on April 22, 1952 for a term of three years, through its agents, Bartholomay & Clarkson, in Chicago, Illinois. At that time Mr. Clay was a citizen of the State of Illinois, residing at 1250 Lake Shore Drive, Chicago (Pl. Ex. 1, R. 5, fol. 8; R. 14), a house which was owned by his wife (R. 21). The whole premium for the full term was paid in Chicago (R. 21, 22). The policy (Pl. Ex. 1, R. 5) on its face is designated

ILLINOIS

PERSONAL PROPERTY FLOATER POLICY
(World Wide)

A personal property floater is an inland marine policy governed by the Illinois Insurance Code, Ill. Rev. Stat., ch. 73, § 616, Class 3(d) (1959). The form of the policy, as well as the rate to be applied must be filed with and approved by the Director of Insurance of that state. Ill. Rev. Stat., ch. 73, §§ 755(2), 1065.22 (1959). Such a policy covers only movable property having no fixed situs.

Petitioner thereafter moved to Florida, living at various places in that state. In 1954 he and his family moved to a ranch near Lake Harbor, Florida, where they lived in the latter part of 1954 and early in 1955 (R. 9). The losses involved in this case occurred on the ranch in December, 1954 and January, 1955 and were caused by the deliberate acts of petitioner's wife (R. 22-24) with whom he was having marital difficulties (R. 16). She set fire to his clothes (R. 22-24) and intentionally slashed a family portrait (R. 12). Other property such as dishes and a tea set were taken by her and deliberately withheld from petitioner (R. 10-11). The personal property floater issued in the name of petitioner, insures,

> "Personal property owned, used or worn by the person in whose name this Policy is issued and members of the Assured's family of the same household, while in all situations, except as hereinafter provided." (Pl. Ex. 1, R. 5, fol. 8)

In the subsequent divorce proceedings between petitioner and his wife, it developed that she had tried to sell some of the personal property involved in this claim (R. 19), that there was a property settlement between them but the items which she had taken were not returned to the petitioner in connection therewith (R. 19).

Petitioner notified the respondent of the loss on February 1, 1955 (R. 19-20). Respondent investigated the claim under a reservation of rights (R. 20), and denied liability to the petitioner on April 6, 1955 (R. 30, Ct. of Appeals opinion). Suit on the policy was filed on May 20, 1957 (R. 1).

The policy contains the following clause:

> "Suit Clause:—No suit, action or proceeding for the recovery of any claim under this Policy shall be sustainable in any court of law or equity unless the same be commenced within twelve (12) months next after discovery by the Assured of the occurrence

which gives rise to the claim. Provided, however, that if by the laws of the state within which this Policy is issued such limitation is invalid, then any such claims shall be void unless such action, suit or proceeding be commenced within the shortest limit of time permitted by the laws of such state to be fixed herein." (Pl. Ex. 1, R. 5, fol. 10)

Respondent asserted two defenses:

1. That the policy sued on provides that no suit for the recovery of any claim shall be sustainable unless commenced within twelve months next after discovery by the assured of the occurrence which gives rise to the claim, and that petitioner's suit on May 20, 1957 was brought approximately two years and four months after petitioner had full knowledge of his loss.

2. That deliberate damage by petitioner's wife, and her taking property from him as an incident of marital difficulties, would not be insured under an "all risks" policy issued in the name of petitioner but covering property owned, used or worn by him and members of his family of the same household.

Petitioner brought suit in the United States District Court for the Southern District of Florida. Trial was held before a jury on June 4, 1958. A verdict was rendered in favor of petitioner (R. 6) on which final judgment was filed June 4, 1958 (R. 6). After denial of respondent's motion for judgment *non obstante veredicto* or in the alternative, for a new trial (R. 7-8), respondent appealed to the United States Court of Appeals for the Fifth Circuit. On April 8, 1959, a decision was rendered reversing the judgment of the District Court and remanding the case for entry of judgment in favor of respondent (R. 28-37).

The Court of Appeals held that the provision in the insurance policy limiting the time in which suit can be

brought, valid in Illinois where the contract was made, is a substantial property right, and that a violation of the due process clause would result if the Florida invalidating statute (Fla. Rev. Stat., § 95.03 (1957)) were applied. The Court of Appeals discussed but did not decide whether the Florida state courts would construe the invalidating statute as applicable to this case. That court further stated that since the defense as to timeliness of suit was upheld, it did not reach respondent's other contention, to wit, the question of the applicability of the policy to the kind of loss involved in this case. Rehearing was denied by the United States Court of Appeals on May 28, 1959 (R. 42).

Summary of Argument

I. A suit clause in a personal property floater policy issued in Illinois to a resident of that state which is valid under Illinois law may not be voided by a Florida statute of general nature merely because the insured later becomes a resident of Florida and sustains a loss in that state. Under the due process clause of the Constitution, a contract valid where made may be nullified by a statute of the forum state only if the following two conditions are met:

(a) The forum state must have a reasonable and legitimate interest in the subject matter of the contract.

(b) The interest of the forum state in the subject matter of the contract must be evinced by a clear and unmistakable expression of local policy in contravention of the terms of the contract.

Home Ins. Co. v. *Dick*, 281 U. S. 397 (1930);
Hartford Accident & Indemnity Co. v. *Delta & Pine Land Co.*, 292 U. S. 143 (1934);
Watson v. *Employers Liability Assur. Corp.*, 348 U. S. 66 (1954);
Hanson v. *Denckla*, 357 U. S. 235 (1958);

Pacific Employers Ins. Co. v. *Industrial Accident Commission*, 306 U. S. 493 (1939);
Holderness v. *Hamilton Fire Ins. Co. of N. Y.*, 54 F. Supp. 145 (S. D. Fla. 1944).

The Florida statute involved here fails to meet the above test on both counts.

On similar facts the Court in *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co., supra,* held that the forum state did not have an interest sufficient to justify the invalidation of a contract lawful where made. On the authority of that case, the opinion below should be affirmed.

Even if the Court, contrary to its decision in *Delta & Pine,* were inclined to hold that under such circumstances the forum state does have a sufficient interest to justify nullifying the contract, nevertheless the statute here should not be so applied because, unlike the statute in *Delta & Pine,* it is inadequate to manifest the existence of the requisite policy interest. In all cases where a forum policy was deemed of sufficient importance to overcome constitutional objections, there existed a clear expression of such policy; there is no case where the Court undertook to construct a local invalidating policy out of an amorphous statute not clearly demonstrative of the forum state's objective. See the statutes upheld in *Watson* v. *Employers Liability Assur. Corp., supra; Hoopeston Canning Co.* v. *Cullen,* 318 U. S. 313 (1943); *Osborn* v. *Ozlin,* 310 U. S. 53 (1940); *Pacific Employers Ins. Co.* v. *Industrial Accident Commission, supra.* Cf. *Hanson* v. *Denckla, supra,* at 252. See also *United Commercial Travelers* v. *Wolfe,* 331 U. S. 586 (1947).

The absence of a definite policy interest on the part of Florida is demonstrated not only by the vagueness of the statute involved, but also by a consideration of the statute in relation to other laws of Florida and by the absence of

any Florida decisions giving the statute in question the invalidating effect advocated by the petitioner.

The facts of this case demonstrate the propriety of supporting the contract under the law of Illinois where the suit clause is valid. *Trichelle* v. *Sherman & Ellis, Inc.*, 259 Ill. App. 346 (1930); *Hartzell* v. *Maryland Casualty Co.*, 163 Ill. App. 221 (1911); *Radick* v. *Underwriters at Lloyds, London*, 137 F. 2d 21 (7th Cir. 1943). The respondent did not select Illinois as the place of issuance. Since the insured was a resident of Illinois, the law of that state required that the policy conform to its laws and approved filings, and the coverage, conditions and rate of premium were controlled by the Insurance Department of that state. Ill. Rev. Stat., ch. 73, §§ 616, 755(2), 1065.19-1065.35 (1959).

II. Under the law of Florida its invalidating statute does not apply to this contract. The issue is whether a contract provision recognized as valid by the law of Illinois where the contract was made is invalidated by the law of Florida where the loss occurred. The case does not involve a choice with respect to which statute of limitations is applicable. *Home Ins. Co.* v. *Dick*, 281 U. S. 397 (1930); *Union Central Life Ins. Co.* v. *Barnes*, 175 Ky. 364, 194 S. W. 339 (1917).

The statute, Fla. Rev. Stat., §95.03 (1957), is one of the sections of the Florida statute of limitations. It purports to declare illegal and contrary to the public policy of the state any provision "in any contract whatever" providing for a shorter limitation than prescribed. It is silent as to whether it applies to contracts made in Florida or to all contracts wherever made. Construed in the light of the legitimate concerns of the legislature, the statute could have been intended only to govern contracts made within the state. See *United States* v. *Palmer*, 3 Wheat. (16 U. S.) 610, 631 (1818); *Griesemer* v. *Mutual Life Ins. Co.*, 10 Wash. 202, 38 Pac. 1031 (1894); *Johnson* v. *Mutual Life Ins. Co.*, 180 Mass. 407, 62 N. E. 733 (1902); *Attorney General*

v. *Netherlands Fire Ins. Co.*, 181 Mass. 522, 63 N. E. 950 (1902). If it were the intention to apply the statute to a contract made elsewhere between citizens of another state, in the event that one of the contracting parties might thereafter take up residence in Florida, such intention would likewise require explicit language. *Ritterbusch* v. *Sexmith*, 256 Wis. 507, 41 N. W. 2d 611 (1950); *Coderre* v. *Travelers Ins. Co.*, 48 R. I. 152, 136 Atl. 305 (1927).

The statute is in any event not a regulation of insurance contracts. All legislation prescribing or prohibiting certain terms in contracts of insurance is encompassed in the Florida Insurance Code. No restriction on the "suit clause" in a property policy is to be found in the Code, which is a comprehensive regulation of the business of insurance. Where restrictions are intended they are specifically set forth. (See Fla. Ins. Laws, § 642.03(n) (1953) (now Fla. Laws 1959, ch. 59-205, § 559, Fla. Ins. Code, § 559 (1959)), limiting suit on accident and sickness insurance policies to two years after proof of loss; Fla. Laws 1959, ch. 59-205, § 592(4), Fla. Ins. Code, § 592(4) (1959), prohibiting the inclusion in group disability policies of provisions limiting the time within which suit must be brought to less than that permitted in individual disability policies (three years)).

III. The taking of household property by the insured wife from the insured husband, and deliberate damage to his clothing and personal possessions, is not a "risk" within the reasonable contemplation of the contracting parties and is not insured under this policy. (See *Mellon* v. *Federal Ins. Co.*, 14 F. 2d 997 (S. D. N. Y. 1926); 2 *Richards on Insurance*, § 212 (5th ed. 1952)).

The policy insures property of all members of Mr. Clay's family of the same household. It is family coverage applying to personal property of Mr. Clay and Mrs. Clay, as well as to all household possessions and furnishings loosely regarded as family property. The policy insures "all risks" with certain specified exceptions. Its coverage

is to be construed in accordance with the objects to be accomplished, i.e., the protection of Mr. Clay and his family against unavoidable and fortuitous events. It is not a "risk" within the contemplation of the parties that marital discord may result in one spouse taking household property and refusing to return it or inflicting deliberate damage on the personal possessions of the other or on particularly cherished family property.

ARGUMENT

POINT I

Under the Constitution a "suit clause" in a personal property floater policy issued in Illinois to a resident of that state, which is valid under Illinois law, may not be voided by a Florida statute of general nature merely because the insured later becomes a resident of Florida and sustains a loss in that state.

The invalidation of the suit clause requires the existence of two conditions: (a) the policy interest of the forum must be of sufficient weight to be accorded overriding protection; and (b) the policy interest of the forum must be clearly formulated and the deprivation of the contract right in issue clearly intended.

(a) With respect to the first condition, it is the position of the respondent that the State of Florida has insufficient interest in the policy in suit to justify the application of Section 95.03 to void the suit clause. Every interest in the contract was centered in Illinois and the law of that state should govern the rights of the parties to the contract.

The Relationship of the State of Illinois to the Insurance Contract

1. Petitioner was a resident of Illinois when he applied for the policy to an Illinois agent of the respondent. The

policy was issued and the entire premium paid in a lump sum in Illinois.

2. The address stated in the policy for Mr. Clay is 1250 Lake Shore Drive, Chicago, a house owned by his wife. Although the policy is a floater and therefore covers the personal property of Mr. Clay and his entire family of the same household, no matter where the property may be, it has certain features which give significance to the residence address. In his declaration of values, the insured gave the approximate values of unscheduled property wherever situated as $36,600, of which only $2,170 was "ordinarily situated throughout the year at residences other than the principal residence" (R. 5, fol. 8). The fine arts rider (R. 5, fol. 12) covers the six listed paintings at the Lake Shore Drive address in Chicago, but coverage elsewhere is limited to 10% of the aggregate amount of the scheduled fine arts coverage. The insurance on the fine arts, furs, and jewelry was issued on the basis of appraisals by Chicago dealers (R. 5, fols. 12, 13).

3. The premium rate for the policy and the terms of its coverage were regulated and controlled by the Illinois Department of Insurance. Under the Illinois Insurance Code, the authority of an insurance company to transact business in that state is in accordance with certain classes into which the statute divides various types of coverage. Ill. Rev. Stat., ch. 73, § 616 (1959). In Class 3 "personal property—floater risks" are listed in subdivision (d), together with other types of so-called inland marine insurance. Every company is required to file with the Director of Insurance its policy forms and rates (Ill. Rev. Stat., ch. 73, §§ 755(2), 1065.22 (1959)) and no company may make or issue a policy except in accordance with filings approved by the Director of Insurance (Ill. Rev. Stat., ch. 73, § 1065.22(8) (1959)). The Code gives to the Director the right to disapprove filings and provides penalties for violation of any of its provisions (Ill. Rev. Stat., ch. 73,

§§ 1065.23, 1065.34 (1959)). Article XXXI of the Code regulates the licensing of agents and prohibits the issuance of a policy through anyone but an Illinois agent duly licensed (Ill. Rev. Stat., ch. 73, §§ 1065.36-1065.59 (1959)). The respondent, therefore, was required by law, in complying with an application by a resident of Illinois for a personal property floater, to issue the policy in Illinois, through an Illinois agent, and in strict compliance with its filings in that state. It did not "attempt to derive the greatest possible advantage from the more lax laws of Illinois" (Petitioner's Br., p. 6; Florida Attorney General's Br., pp. 3-4). It had no choice as to the kind of policy or the place of issuance.

4. The interest of Illinois does not stop with the coverage and rate. It imposes a tax on premiums (Ill. Rev. Stat., ch. 73, § 1021 (1959)). It requires all authorized insurers to maintain unearned premium reserves; a company insuring risks encompassed within Class 3 of § 616, must maintain a reserve for unpaid loss claims of which it has received notice, and must have an itemized record of all such losses and claims (Ill. Rev. Stat., ch. 73, § 1008(1) (1959)). The Director of Insurance is empowered to determine whether the reserves are adequate in the light of the company's loss experience and may require the maintenance of additional loss reserves if he deems it necessary (Ill. Rev. Stat., ch. 73, § 1008(2) (1959)).

The Interest of the State of Florida

1. After the policy was issued, the insured became a resident of Florida. No endorsement was ever applied for or issued when the insured changed his residence, nor were there any transactions of any nature relating to the contract which took place in Florida.

2. The loss happened to take place in Florida, although the coverage of the policy is world-wide and would apply to any loss wherever it might take place. The insured and

his wife had property outside of Florida, as well as within the state (R. 20).

Home Ins. Co. v. *Dick*, 281 U. S. 397 (1930), and *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143 (1934), throw light on what is regarded as a sufficient interest on the part of the forum to justify protecting such interest as against the prohibition imposed by the due process clause of the Fourteenth Amendment.

Home Ins. Co. v. *Dick, supra*, involved the application of a Texas statute similar in content to the general Florida statute in issue. The Court held that the forum statute prohibiting a limitations provision shorter than two years "in any contract" was inapplicable to a suit clause contained in an insurance contract made outside the state between non-residents where the loss had likewise occurred outside the state. It was held immaterial that the plaintiff's permanent residence was in Texas since he also resided in Mexico at the time of the assignment of the policy and at the time of the loss. In accord: *Holderness* v. *Hamilton Fire Ins. Co. of N. Y.*, 54 F. Supp. 145 (S. D. Fla. 1944), in which the Court likewise refused to apply the very Florida statute which is here in issue to a foreign contract entered into between non-residents where the loss occurred in such foreign jurisdiction.

Home Ins. Co. v. *Dick, supra*, leaves unanswered the question as to whether a foreign contract will be enforced where the loss occurs within the forum state and the assured has changed his residence to that of the forum state. However, in *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co., supra*, this issue was determined. That case involved a clause in a suretyship contract requiring notice of claim within fifteen months from the termination of the suretyship for the defaulting employee. At the time the contract was issued, the assured, a Mississippi corporation, had its principal place of business in Tennessee and the contract was issued in Tennessee through the insurer's

Tennessee agent. The contract insured against the defalcations of certain employees wherever committed. The clause in the contract requiring timely notice of claim was legal in Tennessee. After the assured had moved its principal place of business to Mississippi, a defalcation occurred within that state. The assured failed to give timely notice of claim. To the defense that the assured had failed to meet the conditions imposed by the contract, the assured invoked a prohibitory statute of Mississippi. That statute, unlike the Florida statute in the case at bar, was specifically made applicable to insurance and specifically declared that it was the policy of the state to apply the statute to extra-territorial contracts governing risks within the state. The Court held that the interest of the state in protecting insured risks within its borders against the operation of the limiting clause contained in the foreign contract, valid where made, was not so vital as to deserve protection against the due process clause of the Fourteenth Amendment.

In upholding the contract the Court stated:

> "A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum regardless of the relative importance of the interests of the forum as contrasted with those created at the place of the contract, conflicts with the guaranties of the Fourteenth Amendment * * *. Cases may occur in which enforcement of a contract as made outside a state may be so repugnant to its vital interests as to justify enforcement in a different manner. Compare Bond v. Hume, 243 U. S. 15, 22. But clearly this is not such a case." (292 U. S. at 150)

The *Delta & Pine* case is, on its operative facts, identical with the facts in the case at issue, and on the authority of that case, the respondent must prevail. However, it is desirable to consider other relevant cases in order to

ascertain whether later pronouncements of the court have affected its holding. The cases to be considered for this purpose are *Watson* v. *Employers Liability Assur. Corp.*, 348 U. S. 66 (1954); a group of workmen's compensation cases (*Pacific Employers Ins. Co.* v. *Industrial Accident Commission*, 306 U. S. 493 (1939); *Alaska Packers Ass'n.* v. *Industrial Accident Commission*, 294 U. S. 532 (1935); and *Carroll* v. *Lanza*, 349 U. S. 408 (1955)) and cases involving the regulation of foreign insurance companies insuring risks within the borders of the state (*Osborn* v. *Ozlin*, 310 U. S. 53 (1940) and *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313 (1943)).

The leading case which upholds the local policy interest of the forum is *Watson* v. *Employers Liability Assur. Corp.*, *supra*. In that case, the manufacturer of Toni Home Permanent preparations was insured for liability under a policy delivered in Massachusetts. It contained a clause providing that no action shall lie against the insurer unless a judgment is first obtained against the insured. The product was sold throughout the country and the plaintiff, who was injured by its use in Louisiana, sought to sue the manufacturer in that state but service was contested. In suing the insurance company, the plaintiff relied upon a Louisiana statute which specifically provided that whether or not an insurance policy is delivered in Louisiana and whether or not such policy contains a provision forbidding direct action against the insurer a person injured in Louisiana shall have a direct action against the liability insurer provided the accident occurs within the State of Louisiana. The Court held that the interest of Louisiana in protecting those injured within its borders under the circumstances there presented was of sufficient importance to justify the nullification of the foreign contract. The opinion states that injured persons in Louisiana may burden Louisiana hospitals and that Louisiana was the most convenient forum in which to sue since efforts to obtain service on the manufacturer in Louisiana were unavailing and the

necessity for traveling to Massachusetts to obtain a remedy was an oppressive burden on a resident of Louisiana.

The Court did not overrule *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co., supra.*, but affirmed the proposition there stated. It merely distinguished that case on the ground that no vital interest of the forum state was involved. The superior interest of the forum state in the *Watson* case, as compared with that involved in *Delta & Pine* and in the case at issue is easily demonstrable. In *Watson* an unreasonable burden was imposed on an injured party if suit had to be brought against the tortfeasor in a distant jurisdiction, especially when the liability insurer, the ultimate obligor, was amenable to the jurisdiction of the forum state. Moreover, in *Watson*, the insurer was, under the Louisiana statute, permitted to interpose against the injured person each and every defense it might have under the terms of its policy. The statute merely served to bypass the insured and permit suit directly against the insurer.

The problem of enforcing the obligations of a liability insurer so as to afford the injured party the right to payments under the policy is one of long standing. The individual states have sought to deal with it in various ways, the most common of which is a statute creating a direct cause of action against the insurer if a judgment against the insured remains unsatisfied. But the effectiveness of this remedy depends upon the ability of the injured party to bring suit first against the tortfeasor. If the prospective defendant is a non-resident, the injured party is relegated to an action in some other jurisdiction, a proceeding which is cumbersome and expensive. A method devised to relieve the inhabitants of a state from the necessity for traveling elsewhere to sue a non-resident who comes within its borders and inflicts injury is to be found in the so-called nonresident motorist statutes which subject a foreign motorist to the jurisdiction of the state within which he

causes injury. The validity of such statutes was upheld in *Hess* v. *Pawloski*, 274 U. S. 352 (1927). The Louisiana statute passed upon in the *Watson* case is an extension of the same principle and deals with the problem of the nonresident who remains outside of the state but commits a tort by sending an allegedly dangerous product to its inhabitants. The effect of the Louisiana statute is not to impose a liability on the insurer which it did not already have. Enforcement would merely have been delayed under the "no action" clause in its policy. Louisiana sought to make it possible for its residents to seek redress within the state by proceeding directly against the insurer upon whom the liability would have, in any event, ultimately fallen.

Whether the legislation is regarded as valid because the interest of the state makes it immune from attack under the due process clause, the approach taken by the *Watson* majority, or because of the insurer's express consent which it was required to give as a condition to obtaining a Louisiana license, the approach adopted in the concurring opinion of Mr. Justice Frankfurter, the fact remains that the entire membership of the Court perceived a strong and compelling interest on the part of the State of Louisiana which would attach to every liability policy issued to an insured who conducts widespread business activities throughout the entire United States. That interest is not one which attaches at some later date by an unforeseen fortuitous circumstance to a policy which would be of no concern whatever to Louisiana at the time of issuance. It is a present and immediate interest, predicated on Louisiana's rightful concern for the welfare of its own residents which gives rise to its right to legislate extraterritorially by excising the "no action" clause from every liability policy issued to an insured engaged in a nation-wide business or who might commit a tort in the State of Louisiana.

Like the *Watson* case, the compensation cases afford an example of an interest which is recognized as a legiti-

mate concern of the local jurisdiction. Thus in *Pacific Employers Ins. Co.* v. *Industrial Accident Commission, supra,* the Court said that the interest of California in protecting employees who are injured in California and in having their hospital bills paid justifies the application of California law despite the fact that the employment contract was made in Massachusetts and was otherwise subject to Massachusetts law. In accordance with the same principle of recognizing the interest of the state in affording a remedy to injured employees who otherwise may become a public charge, are *Alaska Packers Ass'n* v. *Industrial Accident Commission, supra,* and *Carroll* v. *Lanza, supra.*

With respect to insurance, cases in which state legislation affecting insurance have been upheld against attacks based on extraterritorial objections have invariably involved forum statutes which are closely related to the welfare of the insuring public within its borders. Among such statutes are licensing statutes and statutes imposing reserve requirements on foreign insurers. See *Osborn* v. *Ozlin, supra,* and *Hoopeston Canning Co.* v. *Cullen, supra.* The interest expressed by such insurance statutes is clearly superior to that sought to be effectuated in this case.

The case at bar involves a contract negotiated and consummated in Illinois between an insured residing in that state and a foreign insurer licensed to do business therein. It insures property of the insured and no rights of third parties are affected. No multi-state transaction was involved. Like the scope of the Hartford policy in the *Delta & Pine* case, it covered losses wherever they might take place. The coverage is on movable property having no fixed situs. There was not even involved the casual connection with Florida which the *Delta & Pine* policy had with Mississippi, in that 21 employees in that state were actually listed in the Tennessee contract. It was strictly a contract "made locally, affecting nothing but local affairs

* * *" (*Watson v. Employers Liability Assur. Corp., supra,* at 71), regulated and controlled as to conditions, premium rate and method of issuance by the laws of Illinois and its Department of Insurance.

Any holding that Florida had sufficient interest to apply its statute to respondent's policy would imply that the moment Mr. Clay became a resident of Florida all of his contracts, of whatsoever nature, previously entered into in Illinois or elsewhere became subject to the statutes of his new home. But if he left some of his property in Illinois where it was lost or damaged, would the Florida statute apply merely because he had become a resident of Florida? Suppose, after moving to Florida he went on a trip and sustained a loss in some other state, would the Florida statute apply? If, in such case, Mr. Clay sued in Florida, could its courts constitutionally obey the prohibition of Section 95.03 against giving effect to the suit clause in the policy?

Is the case in any way affected by the fact that the loss took place in Florida? This is a world-wide policy, giving the insured the benefit of coverage anywhere in the world while he was a resident of Illinois and continuing the same benefit after he became a resident of Florida. But if Mr. Clay spent a vacation in Florida while he was still living in Illinois and sustained a loss of baggage during his visit, would Florida thus acquire a sufficient interest in the contract to permit the application of its statutes? We might go further and assume, to create a hypothetical parallel to the *Delta & Pine* situation, that Mr. Clay had a winter residence in Florida while he was still domiciled in Illinois. The policy would cover personal property in the Florida home under those circumstances. Would it be supposed that Florida could claim an interest in a contract made in Illinois between citizens of that state sufficient to apply its own statute to a lawsuit for damage to personal property in the Florida home? The *Delta & Pine* case clearly precludes any such result.

Is it material that the suit was brought in Florida? An insurer may be sued on a policy of insurance in any state where it can be served with process. The cause of action is transitory. Mr. Clay could have sued in Illinois, (*Illinois Life Ins. Co.* v. *Prentiss*, 277 Ill. 383, 115 N. E. 554 (1917)), and if he had never become a resident of Florida and had sustained a loss in Illinois he could have sued in Florida (see *Holderness* v. *Hamilton Fire Ins. Co. of N. Y.*, 54 F. Supp. 145 (S. D. Fla. 1944)). The suggestion on page 11 of petitioner's brief that the State of Florida "was so involved in the case at bar that the right of respondent [sic] to proceed at all in the courts of Illinois is questionable," and the positive assertion that the "only forum having proper jurisdiction was some forum within the State of Florida" are without foundation.

The decision of the constitutional question presented by this case does not involve the simple question as to whether the law of the forum is to be applied as against the law of the state where the contract was made. The mistaken notion that the issue was simply whether the law of the forum should be applicable led the Alabama Supreme Court in *Galliher* v. *State Mutual Life Ins. Co.*, 150 Ala. 543, 43 So. 833 (1907) into the error of merely choosing which statute of limitations would be applicable. Any question as to whether we are dealing with a matter of remedy which is generally governed by the law of the forum has been put to rest by the Court in *Home Ins. Co.* v. *Dick*, *supra*. In rejecting the contention that the prohibitory statute of the forum related merely to remedy and that the contract was therefore to be subject to the law of the forum, Justice Brandeis said:

> "The statute is not simply one of limitation. It does not merely fix the time in which the aid of the Texas courts may be invoked * * * It deals with the powers and capacities of persons and corporations. It expressly prohibits the making of certain contracts." (281 U. S. at 407)

The correct rule was that followed by the court in *Union Central Life Ins. Co.* v. *Barnes*, 175 Ky. 364, 194 S.W. 339 (1917), wherein the law of a forum state similar to that existing in Florida was held inapplicable to a limitations clause in a contract valid where made. In that case, the assured and the beneficiary under a life insurance policy moved to the forum state and resided there at the time of the loss. Such facts were not deemed sufficient to justify the application of the forum law to invalidate the foreign contract.

Certainly the substantive law governing the validity of a contract should be the same in this case whether suit is brought in Florida or elsewhere. If respondent were not admitted to do business in Florida and could not be served with process therein can it be said that its substantive rights would be different merely because the suit had to be brought in some other jurisdiction where service could be effected?

Much emphasis is laid by petitioner and by the Attorney General of Florida on the fact that respondent is licensed to do business in Florida. Respondent, like most other insurers of substance, is licensed in many states and from the record in this case (Pl. Ex. 1, R. 5, fol. 11), we can identify eleven states in which it maintains offices. Its Florida license is unrelated to the policy in suit which was issued pursuant to its license in Illinois and is subject to the regulation of that state. Its license is likewise unrelated to the fortuitous circumstance that Mr. Clay became a resident of Florida. The policy would have continued in force if Mr. Clay had become a resident of any other state whether or not respondent was licensed to do business therein. Respondent was not required (as was the insurer in Louisiana in *Watson*), to consent to Section 95.03 of the Florida statutes. Absent any such factor, respondent's Florida license has no bearing on the issues here to be decided.

> "The contention advanced by counsel for the plaintiff that the defendant impliedly assented to the venue provisions is answered and refuted by repeated decisions holding that a foreign corporation by seeking and obtaining permission to do business in a State does not thereby become obligated to comply with or estopped from objecting to any provision in the state statutes which is in conflict with the Constitution of the United States."
>
> *Power Mfg. Co.* v. *Saunders*, 274 U. S. 490, 496-497 (1927).

It is submitted that Florida had insufficient interest in the policy and in its suit clause to justify extraterritorial legislation, even if we could find a strong public policy manifesting a positive intention to treat a suit clause as an evil.

(b) We turn now to the second branch of the inquiry, and assuming sufficient Florida interest in the contract, we seek to identify the supposed evil and to find some evidence of a strong public policy aimed at combatting it.

The one year suit clause in insurance policies is common, and has been for a long time. Its reasonableness was acknowledged 100 years ago and is generally recognized today.

> "And it is not an unreasonable term that in case of a controversy upon a loss resort shall be had by the assured to the proper tribunal, whilst the transaction is recent, and the proofs respecting it are accessible."
>
> *Riddlesbarger* v. *Hartford Ins. Co.*, 7 Wall. (74 U. S.) 389, 390 (1868).

The one year suit clause has been included in the New York statutory fire insurance policy through many decades. It was carried over from the 1887 policy to the 1918 policy and into the 1943 policy which is the present form. It reads:

> "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of

> law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss." (N. Y. Ins. Law § 168(6))

The 1943 New York standard policy has been adopted in 46 States and the District of Columbia by legislative enactment or approval of the Insurance Commissioner pursuant to statutory authority. Florida adopted it by approval of the Commissioner effective March 1, 1944. The Spectator, *Insurance Laws, Taxes & Fees*, p. 247 (1959).

That the standard one year suit clause is a reasonable provision serving an important function is best demonstrated by the fact that of the states adopting the New York standard policy, 42 plus the District of Columbia, have not undertaken to vary its suit clause provision (Appendix, *infra*, p. 41), despite the fact that the ordinary period provided by general statutes of limitation is six years in most states, as high as 15 years in some, with a few adhering to a three year limit. This reflects acknowledgement by the majority of jurisdictions that there is a sound public necessity for requiring more prompt action by an insurance claimant than is required with respect to ordinary contracts. An insurance company is forced by law in its state of incorporation, as well as in all states in which it may be licensed, to maintain reserves for unpaid losses. Those reserves constitute a charge on its assets which necessarily has a material effect on its balance sheet. If its liability did not terminate after the passage of some period shorter than five or six years, the snowballing effect of cumulative reserves could well result in insolvency. To avoid such consequence would require drastic increase in premium rates to the detriment of the public or the sensible alternative of a limited period during which the insurer is exposed to liability.

The general acceptance of the one year limitation implies a realistic recognition of the fact that an insured who sustains a loss under a policy expects, and usually receives, prompt reimbursement where the claim is legitimate and the liability indisputable. If the policyholder is not promptly satisfied, the issue becomes the subject of litigation in short order. In that respect, the atmosphere differs from that which ordinarily prevails where private disputants cannot amicably resolve their differences, and where the party who considers himself the victim of a breach of contract may hesitate long before resorting to litigation.

There can be no concern about any possible injustice in the enforcement of the suit clause where the delay may be attributable to misleading conduct by the insurer or because of circumstances making it impossible for the insured to bring suit on time. It is uniformly held that the clause can be waived by the insurer, or it can be estopped from asserting it, and that the bar will not be applied in any circumstance where suit within the period was impossible. (20 Appleman, *Insurance Law & Practice*, §§ 11631, 11637 (1947)).

It is submitted that on a nationwide basis it can be said that limitations shorter than the statutory period with respect to claims on insurance policies are expressly approved in most states and that even with respect to the minority, it does not appear that there is any abhorrence for the clause sufficient to ripen into a full fledged public policy outlawing valid contracts made outside the state. Within the purview of its right to regulate the business of insurance within its borders, each state may apply its own views as to particular policy provisions which it may prescribe or prohibit in its insurance code. But that is a far cry from the establishment of a strong public policy warranting extraterritorial activity.

Has Florida expressed an abhorrence for policy clauses limiting the time to sue to a period less than its statute

of limitations? Has it even exhibited any such public policy though not actually expressed? Like Louisiana, it has "an insurance code which comprehensively regulates the business of insurance in all its phases." (*Watson* v. *Employers Liability Assur. Corp.*, *supra*, at 67). Nowhere in the Code is there any suggestion that suit limitations are disapproved. Indeed, the Code actually makes mandatory a short limitations period in certain types of disability policies. Fla. Ins. Laws § 642.03(n) (1953) (now Fla. Laws 1959, ch. 59-205 § 559, Fla. Ins. Code § 559 (1959)), Fla. Laws 1959, ch. 59-205 § 592 (4), Fla. Ins. Code § 592 (4) (1959).

It should be noted that whereas the New York standard fire insurance policy precludes suit "unless commenced within 12 months next after inception of the loss," the clause in respondent's policy says "12 months next after discovery by the assured of the occurrence which gives rise to the claim." This is not a provision "fixing the period of time in which suits may be instituted" (Section 95.03) to a period less than that provided for by the statute of limitations of Florida. It may be less, it may be more, since the contract period runs from *discovery* of the loss, not from its inception. See *Atlantic Coast Line R.R.* v. *Chase & Co.*, 109 Fla. 50, 146 So. 658 (1933).

Where a strong public policy exists, Florida makes it explicit and clear. Its insurance code contains a statute similar to the California Unauthorized Insurers Process Act (Cal. Ins. Code, §§ 1610-1620), the validity of which was upheld in *McGee* v. *International Life Ins. Co.*, 355 U. S. 220 (1957). Aligning itself with a number of other states concerned with the problem of residents holding policies delivered to them in the state by unauthorized insurers, the Florida statute contains a firm declaration by the legislature of the nature of its interest and the necessity for providing a method of substituted service by exercising "its power to protect its residents" (Fla. Laws 1959, ch. 59-205, § 346, Fla. Ins. Code, § 346 (1959)). Another example of an expression by Florida of a declaration of

interest and purpose is found in Fla. Laws 1959, ch. 59-205, § 352, Fla. Ins. Code, § 352 (1959), dealing with Florida's "surplus lines law".

Section 95.03 is part of a general statute listing statutes of limitation. The particular section at issue merely states that all provisions in any contract fixing the time for suit at less than the statute of limitations "are hereby declared to be contrary to the public policy of this state, and to be illegal and void". Indeed, in the published compilation of insurance laws issued by the Florida Insurance Commissioner, Section 95.03 is not included, although other miscellaneous laws having a bearing on insurance but not part of the Florida Insurance Code are set forth. The absence of any public policy whatever with respect to suit limitations in insurance policies is perhaps best reflected in a recent (undated) manual published by the Honorable J. Edwin Larson, Insurance Commissioner of Florida, entitled "Questions and Answers for Insurance Adjusters (Second Revision)". The foreword reads as follows:

> "As Insurance Commissioner of Florida, I feel that all persons associated with this great industry should have a thorough knowledge of the insurance laws of Florida as well as a knowledge of insurance practice and theory. Only if this holds true can the insuring public be served and protected in a manner which it has a right to expect from professional people.
>
> I hope this manual, the product of much time and effort, will serve in some respect to improve the knowledge and understanding of those persons entering the field of Fire and Casualty claims adjustment as well as to provide a ready reference for adjusters already licensed and established."

In Section 7 of the manual, headed "Fire and Allied Lines", there appears the following question and answer (question 143, p. 86):

> "Q. How long after a loss may a suit or action for recovery of any claim be sustainable in court?

> A. The suit or action must be brought within 12 months next after the fire and the insured must show compliance with all the requirements of the policy."

We also find that any Florida statute requiring a departure from ordinary policy conditions is recognized and specifically referred to in the manual. For example, there is a special discussion of the effect of Florida's valued policy law, a statutory departure from a provision of the standard fire policy (question 95, p. 80).

The Court has adhered to the view that a state seeking to uphold legislation which might conflict with constitutional guarantees must clearly exhibit a strong and positive policy. In *Hanson* v. *Denckla*, 357 U. S. 235 (1958), the Court distinguished *McGee* v. *International Life Ins. Co.*, *supra*, by pointing out that its decision upholding the California Unauthorized Insurers Process Act had made special note of the interest of California in providing redress for its citizens. The Court said:

> "This case is also different from *McGee* in that there the State had enacted special legislation * * * to exercise what *McGee* called its 'manifest interest' in providing effective redress for citizens who had been injured by nonresidents engaged in an activity that the State treats as exceptional and subject to special regulation." (at p. 252)

Whether a state actually has a public policy is sometimes determinable, as we contend it is in Florida, by reference to other portions of its law. Thus, in *Hughes* v. *Fetter*, 341 U. S. 609 (1951), the Wisconsin Supreme Court had held that a statute creating a right of action for deaths caused within the state established a public policy against suits brought under the wrongful death acts of other states. The Court disagreed with the state court as to strength of the Wisconsin policy, saying:

> "We hold that Wisconsin's policy must give way. That state has no real feeling of antagonism against

> wrongful death suits in general. To the contrary, a forum is regularly provided for cases of this nature, the exclusionary rule extending only so far as to bar actions for death not caused locally." (at p. 612)

In *United Commercial Travelers* v. *Wolfe*, 331 U. S. 586 (1947), the Court addressed itself to the problem of whether South Dakota could apply its statute, in a case involving a local contract, to invalidate a suit clause in a policy of a fraternal benefit society organized in Ohio. The claimed existence of a South Dakota policy adverse to suit clauses was first examined. The Court pointed out that the general statutes of limitation of South Dakota varied from 20 years to one year, that it required (as does Florida) a shortened contractual limitation in health or accident policies, that the South Dakota statutes have expressed no hostility toward fraternal benefit societies and that "the alleged prohibition by South Dakota of such a contractual limitation as is contained in § 11 and the public policy of South Dakota against such limitations depend entirely upon its statute directed generally against contractual limitations upon rights to sue upon contracts . . . ." (at p. 612). The Court refused to recognize the existence of a sufficiently strong local policy based on such general statute.

Closely related to the apparent absence of any Florida policy with respect to suit clauses, is the significant fact that its legislature has exhibited no intention that the statute have extraterritorial scope. It is submitted that the proper construction of Section 95.03 would limit its applicability to contracts made within the state. Respondent's position in that regard will be fully developed in its next point which concerns itself with whether or not, under Florida law, the statute applies to its contract. Reference to the question of interpretation becomes relevant here, as part of the discussion of constitutional issues, by virtue of a controlling principle many times announced by the Court.

> "It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. * * * And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."
>
> *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 407-408 (1909).

Respondent urges that the Florida statute in the case at bar is reasonably susceptible of only one interpretation, i.e., that it is limited to contracts made within the state. It does not assert any extraterritorial applicability; to so extend its scope actually requires that something be read into it. But even assuming a reasonable choice of interpretations, it is submitted that the construction which avoids constitutional infirmity should be adopted. There is no case in Florida holding the statute applicable to contracts made elsewhere. Under such circumstances, it is contrary to sound principle to ask the Court to adopt such a construction.

> "A different construction would raise the novel and important question of the constitutionality of a temporary rate, based solely on depreciated original cost, with provision for recoupment of the loss from insufficient temporary rates. In the absence of an authoritative state decision, we are reluctant to accept a construction which brings forward that issue * * *."
>
> *Driscoll* v. *Edison Light & Power Co.*, 307 U. S. 104, 114-115 (1939).

The discussion under Point I established the following principles: With respect to the requirement that Florida must have a legitimate policy interest deemed worthy of protection against a due process objection, it is clear that on the authority of *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co., supra*, no such vital policy interest exists here. Furthermore, none of the cases decided after *Delta & Pine* which invalidate a foreign insurance contract, legal where made, overrule the holding in *Delta & Pine*. The policy interest which was deemed worthy of protection in such cases was not simply the safeguarding of a resident against a shorter suit clause, in a contract to which he was a party, but involved the vital importance of affording a local remedy for persons injured within the borders of the forum state. Furthermore, even assuming the policy interest of the forum was deemed worthy of protection in the case at issue, Florida has failed to enunciate any such policy in sufficient terms for it to have an invalidating extra-territorial effect. None of the cases which upheld the forum interest based such interest on a non-specific statute such as the statute involved in this case. Moreover, the approval of similar suit clauses under the authority conferred on the Insurance Commissioner of the state by the Florida Insurance Code belies the existence of any such policy within its borders. Consequently, the Court cannot be called upon to create out of the general statute invoked here a local policy of Florida which is designed to outlaw suit clauses in foreign insurance contracts.

POINT II

Under the law of Florida, a general statute voiding all provisions "contained in any contract whatever" shortening the time to sue to a period less than that provided by the statute of limitations does not apply to a contract of insurance issued in Illinois to a citizen of Illinois.

The Court of Appeals for the Fifth Circuit discussed Fla. Rev. Stat., § 95.03 (1957), stating "that the jurisprudence of Florida gives us reason to believe that the Florida State Courts would construe it as being inapplicable under these circumstances" (R. 30-31), but concluded that it was not obliged to decide the question because the requirements of due process would in any event prevent application of the Florida statute to the contract at bar. Respondent's contention that the statute is inapplicable under the law of Florida has therefore not been passed upon, and if the Court should disagree with the Court of Appeals on the constitutional issue, the question will then arise as to whether the case is to be remanded to the Court of Appeals for a determination with respect to the law of Florida on the interpretation of the statute (and also with respect to respondent's contention that the policy does not cover the kind of loss which took place). *Huddleston* v. *Dwyer*, 322 U. S. 232, 237 (1943); *United States* v. *Ballard*, 322 U. S. 78, 88 (1943); *Rosenthal* v. *New York Life Ins. Co.*, 304 U. S. 263, 264 (1938); *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, 208-209 (1938).

Since the Court may, if it chooses, make a determination on the two questions not passed on by the Court of Appeals and hence not presented to it by the petition for certiorari, respondent will present its arguments on both issues. *Walling* v. *General Industries Co.*, 330 U. S. 545, 547 (1947); *Langnes* v. *Green*, 282 U. S. 531, 535-39 (1931); *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 560 (1931).

To the extent that the question of interpretation of Florida's Section 95.03 has been discussed in the previous point in relation to the constitutional questions, there will be no repetition here. Respondent will treat the statute as if there were no constitutional issue involved.

It is the law of Florida that an insurance policy issued in Illinois to a citizen of that state insuring personal property in that state, is an Illinois contract, the validity and interpretation of which is determined by the law of Illinois. *Connor* v. *Elliott*, 79 Fla. 513, 85 So. 164 (dictum), *cert. dismissed*, 254 U. S. 665 (1920). It is the law of Illinois that the clause limiting the time to sue is valid and presents a good defense under Illinois law. *Trichelle* v. *Sherman & Ellis, Inc.*, 259 Ill. App. 346 (1930); *Hartzell* v. *Maryland Casualty Co.*, 163 Ill. App. 221 (1911); *Radick* v. *Underwriters at Lloyds, London*, 137 F. 2d 21 (7th Cir. 1943).

In avoidance of the defense, petitioner invokes Section 95.03, a statute of general nature, dating back to 1913, which declares that "all provisions and stipulations contained in any contract whatever * * *" shortening the time to sue "are hereby declared to be contrary to the public policy of this state, and to be illegal and void."

There is nothing in the statute making it applicable to contracts made outside of the State of Florida. Construing it to apply outside the state requires grafting an extra-territorial extension to the statute merely because it does not expressly restrict its operation to contracts made within the state. The inquiry then is whether any such construction would be reasonable or justified.

Interpreted in the light of the legitimate concerns of the Florida legislature, the statute could have been intended to govern only contracts made within the state. It is too obvious to require discussion that the Florida legislature could have had no conceivable interest "in any contract whatever" made in various of the 50 states in no way

affecting the welfare of the citizens of Florida. Imputing any such intention to the Florida legislature would be an absurdity.

Adverting to a similar expression in a statute, Chief Justice Marshall in *United States* v. *Palmer*, 3 Wheat. (16 U. S.) 610, 630 (1818), said:

> "The words of the section are in terms of unlimited extent. The words 'any person or persons,' are broad enough to comprehend every human being. But general words must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them. Did the legislature intend to apply these words to the subject of a foreign power, who in a foreign ship may commit murder or robbery on the high seas?"

The authorities generally agree that an intention to legislate extraterritorially beyond the scope of legitimate interest will not be presumed. *Griesemer* v. *Mutual Life Ins. Co.*, 10 Wash. 202, 38 Pac. 1031 (1894); *Johnson* v. *Mutual Life Ins. Co.*, 180 Mass. 407, 62 N. E. 733 (1902); *Attorney General* v. *Netherlands Fire Ins. Co.*, 181 Mass. 522, 63 N. E. 950 (1902).

A Rhode Island "direct action" statute which sought to accomplish the purpose of the Louisiana statute involved in the *Watson* case imposed its requirement on "every policy hereafter written". The Rhode Island Supreme Court construed it as applicable only to policies written in Rhode Island. *Coderre* v. *Travelers Ins. Co.*, 48 R. I. 152, 136 Atl. 305 (1927). In accord: *Riding* v. *Travelers Ins. Co.*, 48 R. I. 433, 138 Atl. 186 (1927); *Ritterbusch* v. *Sexmith*, 256 Wis. 507, 41 N. W. 2d 611 (1950).

No court in Florida has ever held that Section 95.03 applies to contracts made outside the state. The Supreme Court of Kentucky, where there was no statute but an established public policy against suit clauses in insurance

contracts, held the local policy inapplicable to an insurance contract made in another state. *Union Central Life Ins. Co.* v. *Barnes*, 175 Ky. 364, 194 S. W. 339 (1917). (cf. *Galliher* v. *State Mutual Life Ins. Co.*, 150 Ala. 543, 43 So. 833 (1907), where the Court erroneously assumed that it was merely concerned with deciding which statute of limitations should apply.)

In *Storing* v. *National Surety Co.*, 56 N. D. 14, 215 N. W. 875 (1927), the Supreme Court of North Dakota passed upon a suit clause defense valid in Minnesota, where the defendant claimed the contract was made, but rendered invalid by a North Dakota statute which required a longer period within which suit was permitted. The court declared that it could not apply the statute if the contract had, in fact, been made in Minnesota. It was thus required to decide whether the contract had been made in Minnesota or in North Dakota. It found that the policy was, in fact, a North Dakota contract and overruled the defense.

To the ext[illegible] that Florida has had occasion to concern itself with [illegible] extraterritorial applicability of its own statutes, it has consistently ruled against such extension. *Equitable Life Assur. Soc.* v. *McRee*, 75 Fla. 257, 78 So. 22 (1918), involved a life insurance policy issued in Alabama to a resident of that state, a later change of beneficiary while the insured was a resident of Georgia, after which the insured became a resident of Florida, where he lived until his death. A Florida statute made mandatory the distribution of policy proceeds to certain relatives. According to the policy, it was payable to the insured's estate, a provision valid under the law of Alabama and Georgia. The Florida Supreme Court said:

> "It is manifest that the statute can have no force beyond the limits of this State. If, as averred in the special pleas, the contracts of insurance were made in Alabama, and, if as averred, while the insured was a resident of the State of Georgia, he changed the

> beneficiary so as to make the policies payable to his executors, administrators, or assigns, the statute is not applicable for the purpose of designating the parties to whom the proceeds of the policies may be paid by the insurer, though the insured afterwards died in Florida while he was a resident of and domiciled in this State, and though in such case the statute may designate the beneficiaries of the proceeds of the policies." 75 Fla. at 265

In *American Fire Ins. Co.* v. *King Lumber & Mfg. Co.*, 74 Fla. 130, 77 So. 168, *aff'd* 250 U. S. 2 (1919), the Florida Supreme Court passed upon the applicability of a Florida statute which provided without qualification that the person to whom the insured paid premiums was deemed to be the agent of the insurer for all purposes. The court said:

> "Neither the Legislature nor the courts of Florida could extend the operation of its statutes beyond its borders, and this is likewise true of Pennsylvania. The Legislature of Florida would seem to have made no such attempt." (at p. 145)

In accord: *Sovereign Camp Woodmen of the World* v. *Mixon*, 79 Fla. 420, 84 So. 171 (1920).

It is apparent from the Florida Supreme Court opinions cited above, as well as the better reasoned opinions of other state courts faced with similar problems of interpretation, that the Court of Appeals was correct in its belief that the Florida courts would not construe Section 95.03 to apply to foreign contracts.

POINT III

An "all risks" personal property floater covering all members of the family residing in the same household does not insure one spouse against deliberate acts of the other.

As heretofore mentioned, this point was not passed upon by the Court of Appeals.

The personal property floater is a "family policy". Usually written in the name of the head of the family, in this case John Clay, its coverage attaches to all family members resident in the same household on property owned, used or worn by any of them. Listing the names of the members of the family is not required. In paragraph 7 of the policy (Pl. Ex. 1, R. 5, fol. 8), the insured declares the approximate values in various categories of personal possessions, some of which may be personal to the husband, some to the wife, some to children. Much of the list is a mixture of household furniture, equipment and supplies which a layman regards generally as family property without a thought to the question of where legal title may lie. While the specifically insured items of fur and jewelry (Pl. Ex. 1, R. 5, fol. 13) are obviously identifiable to Mrs. Clay, the policy as a whole makes no distinction between members of the family. It constitutes a single insurance on all personal property.

The coverage is against all risks of loss or damage. This constitutes an undertaking to indemnify with respect to the occurrence of any fortuitous event which may result in loss or damage to the insured personal property. It is not intended to protect one spouse against the deliberate acts of the other stemming from marital discord. It is not intended to reimburse the husband against the loss of property taken by the wife, while still residing with him, which he is later unable to retrieve within the framework

of a divorce proceeding. It is not intended to reimburse the husband for damage to his personal effects spitefully caused by the wife while they are still residing together.

The limitations on the breadth of "all risks" coverage are not ordinarily susceptible of precise definition.

In Pierce, *Development of Comprehensive Insurance for the Household,* pp. 16, 44 (S. S. Huebner Foundation for Insurance Education, University of Pennsylvania, 1958), "all risk" coverage is discussed as follows:

> "The events insured against are ordinarily termed perils or hazards because they are unintentional, insofar as the insured is concerned, and because they produce loss. The definition of the perils insured against is accomplished by the use of one or more names in the insuring agreement to connote such events and by such explanatory definitions, extensions, and exclusions as are needed to indicate any intended meanings which are not conveyed by the names alone. The names of perils may be of narrow significance, like the word 'explosion,' for example, or they may have very general application, like the term 'all risks.' In the former case, the list of perils assumed is of primary importance; in the latter, it is the list of excluded causes of loss which is used to determine the true scope of the hazard coverage. However, it is important to note that even the expression 'all risks' does not include every possible cause of loss, but only those which are fortuitous." (at p. 16)
>
> "* * * A risk implies a chance occurrence—a fortuitous or unexpected event which results in loss. * * *" (at p. 44)

In discussing some of the restrictions on the scope of "all risks," the author deals with damage resulting from deliberate acts even though the damage was not intended by the insured.

> "* * * If the insured is one who is working upon the property or subjecting it to some process, he can hardly expect a loss caused by his own deliberate

act to be considered as due to a risk, even though certain unexpected consequences are involved. If he soaked woolens in water to clean them, he should expect damage to follow. Such damage would not be due to a risk but to a misguided intentional action of the insured. Similarly, if the insured chose to wade through a puddle while wearing his shoes, any resultant damage to them would be attributable to this deliberate action."

Pierce, *op. cit, supra,* at 44-45.

In 2 *Richards on Insurance* § 212 (5th ed. 1952) "all risk" coverage is described as follows:

> "The All Risk type of insurance policy is unlike any other type of policy such as life, fire, marine, fidelity and surety, or casualty, in that it does not specify the kind or kinds of Insured Event or Events which must cause loss or damage in order to make the insurer liable. The All-Risk policy is in terms a promise to pay upon the fortuitous and extraneous happening of loss or damage to a specified thing or persons from any cause whatsoever. This type of contract has been said to cover every conceivable loss or damage that may happen except when occasioned by the wilful or fraudulent act or acts of the insured."

In *Mellon* v. *Federal Ins. Co.*, 14 F. 2d 997, 1002 (S. D. N. Y. 1926), the court discussed various non-fortuitous losses held not covered under marine policies, such as losses caused by deliberately forcing a vessel through ice (*Newtown Creek Towing Co.* v. *Aetna Ins. Co.*, 163 N. Y. 114, 57 N. E. 302 (1900)) or resulting from the deliberate grounding of a ship for convenience in unloading (*Magnus* v. *Buttenmer*, 11 C. B. 876 (1852)). The court concluded that part of the damage involved in that case was accidental and recoverable, while part was disallowed as not being within the risk covered. The court said:

> "I have followed the English authorities, because I think them right in holding that, even in an 'all risk' policy, there must be a fortuitous event—a casualty—to give rise to any liability for insurance." (at p. 1004)

We are not here concerned with cases dealing with the insurer's liability under a fire insurance policy insuring only the property of an innocent insured who is permitted to recover for damage by a fire deliberately set by a spouse. However, if the person seeking recovery set the fire himself, he would be barred, not because the insured event did not come to pass, but because it would be improper to permit a man to profit by his own wrong or because it would violate the fraud clause of the policy. Similarly, in a case where the policy insures the interests of several people and one deliberately sets the fire, it has been held that the innocent insured may not collect.

> 'It is fundamental that an insured who deliberately sets fire to the insured property cannot recover on a policy of fire insurance. To permit a recovery under such circumstances would reward crime and shock the most fundamental notions of justice. To permit a recovery by either the partnership or the unoffending partner upon a policy of insurance issued to a partnership insuring partnership property where one of the parties has wilfully fired the insured property is likewise repugnant to an intuitive sense of justice.''
>
> *Bellman* v. *Home Ins. Co. of N. Y.*, 178 Wis. 349, 350, 189 N. W. 1028 (1922).

See also *Sternberg* v. *Merchants Fire Assur. Corp.*, 6 F. Supp. 541, 543 (E. D. Wis. 1934).

Where the policy is joint, it has been held that an innocent owner is precluded from recovery if the fire is deliberately caused by the co-owner. *Kosior* v. *Continental Ins. Co.*, 299 Mass. 601, 13 N. E. 2d 423 (1958); *Monaghan* v. *Agricultural Fire Ins. Co.*, 53 Mich. 238, 18 N. W. 797 (1884); *Bowers* v. *London Assur. Corp.*, 90 Pa. Super. 121 (1926); *Bridges* v. *Commercial Standard Ins. Co.*, 252 S. W. 2d 511 (Tex. Ct. Civ. App. 1952); *Jones* v. *Fidelity & Guaranty Ins. Corp.*, 250 S. W. 2d 281 (Tex. Ct. Civ. App. 1952); *Klemens* v. *Badger Mutual Ins. Co. of Milwaukee*, 10 Fire & Casualty Cases 218 (Sup. Ct. Wis., December 1, 1959).

Respondent urges that it is repugnant to sound public policy that an insurer who undertakes to protect a family against fortuitous damage should be expected to guarantee that if marital discord should arise, neither spouse will make off with property belonging to the other or give vent to spiteful impulses by inflicting deliberate damage upon the property of the other. That is not a "risk" nor has it ever been regarded as an insurable occurrence with respect to which there is sufficient actuarial experience to fix a proper premium.

CONCLUSION

It is respectfully submitted that the Court should affirm the decision of the Court of Appeals holding that the statute may not be constitutionally applied so as to invalidate the contract in this case. If the Court were to hold that the statute may constitutionally be so applied, judgment should be rendered in favor of the respondent on the ground that (1) under the law of Florida the statute is inapplicable to the contract; and (2) the loss is not covered by the contract; or in the alternative, the Court should remand the case for a determination of the aforesaid questions of law, neither of which was previously passed on by the Court of Appeals.

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APPENDIX

1. *One Year Suit Clauses:* States which have adopted by statute, or by the Insurance Commissioner under authority of statute, the New York standard fire policy requiring a one year suit clause.

Alabama	Kentucky	Oklahoma
Alaska	Louisiana	Oregon
Arizona	Maryland	Pennsylvania
Arkansas	Michigan	Rhode Island
Colorado	Mississippi	South Carolina
Connecticut	Missouri	South Dakota
Delaware	Montana	Tennessee
District of Columbia	Nebraska	Utah
	Nevada	Vermont
Florida	New Hampshire	Virginia
Georgia	New Jersey	Washington
Hawaii	New Mexico	West Virginia
Idaho	New York	Wisconsin
Illinois	North Carolina	Wyoming
Iowa	Ohio	

2. *Variations:* States which have adopted the New York standard form but have increased the time within which suit must be brought.

Indiana	— 3 years
Kansas	— 5 years
Maine	— 2 years
North Dakota	— 5 years

3. *Special Forms:* States which have adopted their own standard forms:

California	—15 months
Massachusetts	— 2 years
Minnesota	— 2 years
Texas	— 2 years

NOTE: In a few of the states listed the standard one year suit clause may be rendered void by decisions applying invalidating statutes to contracts issued within the state. The above list is relied upon not as being definitive of the law of any particular state, but as demonstrating that not only Illinois, but the overwhelming majority of states, do not regard the one year suit clause as an evil, but, on the contrary, require its inclusion in fire policies issued in their states.

Certificate of Service

The undersigned, attorney for respondent, certifies that a true and correct copy of the foregoing brief for the respondent has been served on W. Terry Gibson, Esq., 209 South Olive Avenue, West Palm Beach, Florida, attorney for petitioner, by mailing air mail with postage prepaid, this 11th day of February, 1960.

EUGENE A. LEIMAN,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 349.

JOHN CLAY, *Petitioner,*

vs.

SUN INSURANCE OFFICE, LIMITED, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

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CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved in the case are the same as those referred to in Petitioner's Brief After Writ of Certiorari on page 2.

IN THE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

STATEMENT OF THE CASE.

The statement of the case as set out in the Brief of the Petitioner, and the Brief of the Respondent, is substantially correct.

ARGUMENT.

POINT 1.

The Respondent in Its Brief Has Attempted to Divide the Argument in Reference to the Question Raised by the Petitioner into an Argument on Two Points.

In the petitioner's original brief, the matter of the interest of the State of Florida in the contract between the petitioner and the respondent is fully covered, and no attempt is made in this reply brief to discuss the first point raised by the respondent, except in reference to the assertion in the brief in reference to the public policy of the State of Florida having been changed by some utterances or apparent rulings by the Hon. J. Edwin Larson, Insurance Commissioner of Florida.

The respondent seems to have lost sight of the real question presented in these proceedings. On page 23 of the Brief of the Respondent, we find the unusual statement in the following:

> "The 1943 New York standard policy has been adopted in 46 states and the District of Columbia by legislative enactment or approval of the Insurance Commissioner, pursuant to statutory authority. Florida adopted it by approval of the Commissioner, effective March 1, 1944. The Spectator, *Insurance Laws, Taxes & Fees*, page 247 (1959)."

The attention of the Court in reference to the delegation of legislative powers, is called to Article II of the Constitution of the State of Florida:

> "The powers of the government of the State of Florida shall be divided into three departments, legis-

lative, executive and judicial; and no person properly belonging to one of the departments shall exercise any power pertaining to either of the others, except in cases expressly provided for by this Constitution."

Apparently the respondent is advancing the theory that the State Treasurer of the State of Florida, as Insurance Commissioner under the Insurance Code of said State, has had delegated to him by the Legislature, powers under which he, as Insurance Commissioner, could legislate the public policy of the State of Florida; that he has been given power to enact laws and statutes heretofore enacted by the Legislature of the State of Florida.

The respondent calls the Court's attention to a recent undated manual published by the Hon. J. Edwin Larson, Insurance Commissioner of Florida, entitled "Questions and Answers for Insurance Adjusters (2nd Edition)." Attention of the court is called to Section 7 of said manual headed "Fire and Allied Lines" wherein the following question and answer appears (Question 143, p. 86):

"Q. How long after a loss may a suit or action for recovery of any claim be sustained in court?
A. The suit or action must be brought within 12 months next after the fire, and the insured must show compliance with all the requirements of the policy."

The respondent implies that this statement, contained in a publication issued by the Insurance Commissioner of Florida, establishes the public policy of the State of Florida on the question presented to the Court in the petition for certiorari. If the implication of the respondent has any merit, then the implication is that the legislative powers have been delegated to an administrative officer not contemplated by the Constitution, and in fact in direct conflict therewith. The Supreme Court of the State of Flor-

ida, in the case of *Robbins* v. *Webb's Cut Rate Drug Store*, 16 So.2d 121 (1944), definitely denied the right of the Legislature to delegate its powers to an administrative officer, and in said case held:

> "In State v. Fowler, 94 Fla. 752, 114 So. 435, 437, this Court defined the rule to guide the legislature in the promulgation of statutes vesting the rule making power in administrative boards as follows: 'The Legislature may not delegate the power to enact a law or to declare what the law shall be, or to exercise an unrestricted discretion in applying a law; but it may enact a law complete in itself designed to accomplish a general public purpose, and may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law within its expressed general purpose.' "

See also *Pursley* v. *City of Ft. Myers*, 87 Fla. 428, 100 So. 366 (1942), wherein the Supreme Court of Florida used even stronger language regarding an attempted delegation of the powers of the Legislature:

> "Under the doctrine of the separation of the powers of government, the lawmaking function is assigned exclusively to the Legislature. The generally recognized rule is that any attempt to abdicate it in any particular field, although valid in form, is unconstitutional and void."

If, under the theory advanced by the respondent, the Insurance Commissioner by some act has attempted to establish the public policy through the Insurance Code, then such act of the Insurance Commissioner is totally unconstitutional and void. The Insurance Commissioner does not have the power to establish public policy in the State of Florida. The Legislature of the State of Florida established the public policy of the State in reference to the

specific provision involved herein, when it enacted Section 95.03, Florida Statutes, 1959. The Legislature of the State of Florida is the only body which has the right to establish the public policy of the State. The Supreme Court of Florida has set that question at rest in any number of decisions, among which is *Noble* v. *State*, 68 Fla. 1, 66 So. 153 (1914), wherein the court held:

> "The contention that the statute is contrary to public policy is unavailing, since the Legislature declares the public policy of the State in enacting the Statute,"

and in the case of *Davis* v. *Spring*, 191 So. 451 (1940), wherein the Court said:

> "Public policy, or what constitutes public policy, is a matter of legislative determination; it is embraced in the Constitution, legislative acts and judicial decisions * * *."

Therefore, the Legislature of the State of Florida, in the original enactment and retention upon the statute books of the State, of Section 95.03 established the public policy of the State as to the inclusion in contracts, including insurance contracts, of the requirement that suits thereon must be started within a period of time less than that fixed by the Statute of Limitations of the State of Florida.

The fact that the Insurance Commissioner of the State of Florida has caused to be filed in this suit, through the Attorney General of the State, a brief as *amicus curiae*, definitely repudiates the contention on the part of the respondent that the Insurance Commissioner has established or attempted to establish, public policy contrary to the requirements of the statute in question. The respondent seems to imply that since the Insurance Code does contain two provisions which apparently change the time for bring-

ing suit in certain types of disability policies, the entire policy of the State of Florida has been changed. As a matter of fact, the inclusion in the Insurance Code of the two provisions referred to by the respondent, clearly shows that the Legislature did not intend to allow the Insurance Commissioner of the State of Florida to act on his own initiative in setting the policy of the State. Where the legislature intended that a change be made, then it wisely enacted a law making the change. If the Legislature had intended to change the public policy in reference to all insurance policies, then it would have included in the Insurance Code a section so stating the change.

On page 25 of its brief, referring to the twelve months limitation clause provided in the policy, the respondent says:

> "This is not a provision fixing the period of time in which suits may be instituted (Section 95.03) to a period less than that provided for by the statute of limitations of Florida. It may be less, it may be more, since the contract period runs from *discovery* of the loss, not from its inception."

Actually, the above statement is begging the question. The question is whether this period does, in effect, fix the period of time in which suits may be instituted, at a time less than that provided for by the Statute of Limitations of the State of Florida, and certainly not whether the time may be less or may be more.

We feel that the attention of the court should be directed to the fact that at the time the insurance policy involved in this suit was entered into, the petitioner paid the premium in advance for three years. If, as is done in most cases, the premium had been paid annually, the second premium would have been paid in Florida, and the questions raised in this action would not have been perti-

nent. Petitioner should not be penalized in this instance because he had sufficient funds with which to pay a three year premium, and thereby realize a discount from the respondent. The respondent benefited as much or more than did the petitioner by the payment of the premium for three years in advance. Since the petitioner moved to Florida within a short time after the payment of the premium, he should not be penalized for an act that was beneficial to the respondent.

POINT 2.

Although the Applicability of Section 95.03, Florida Statutes, to Contracts Made in Other States, Has Not Been Decided in the Florida Courts, the Court Below Failed to Distinguish Between the Pronouncements of the Florida Courts As to the Application of Florida Statutes or Public Policy to Contracts Valid in the State Where Made Which Dealt with Contracts Other Than Insurance and Contracts of Insurance.

The respondent cited certain cases where it claims the Florida courts have refrained from attempting to apply Florida statutes of public policy to contracts valid in the state where made, to-wit: *Connor* v. *Elliott*, 79 Fla. 513, 85 So. 164, Cert. dismissed 254 U.S. 665 (1920); *Sovereign Camp, Woodmen of the World*, v. *Mixon*, 79 Fla. 420, 84 So. 171 (1920); *Equitable Life Assur. Soc. of U.S.A.* v. *McRee*, 75 Fla. 257, 78 So. 22 (1918); *American Fire Ins. Co.* v. *King Lumber & Mfg. Co.*, 74 Fla. 130, 77 So. 168 (1917), aff'd 250 U.S. 2 (1919).

With the exception of *Sovereign Camp, Woodmen of the World*, case, these cases deal with the substantive law. The *Sovereign Camp, Woodmen of the World*, case, while dealing with Section 95.03, Florida Statutes, is not remotely on point with the case at bar, since it refers to a case

where the policy was written in Florida by a Florida Agent for a Florida resident. This case simply confirms the constitutionality of Section 95.03, Florida Statutes. In no part of its opinion does the Court refer to the application of the Florida statutes to contracts valid in the state where made.

The *Connor* v. *Elliott* case deals entirely with real property, and the Florida court held that contracts dealing with real estate or immovable property are subject to the law of the location of the property.

In the case at bar the interests of the State of Florida are superior to any other state because under the terms of the contract, worldwide floater insurance policy, Florida became the place of performance of the contract, the place in which the loss occurred, and the state of the policyholder's domicile at the time of the loss. The insurance company was legally admitted to do business in the State of Florida, was regulated in its business by Florida, and notice of loss was filed with the insurance company in Florida. The remedy under the policy could only be brought in Florida, and the contract provision for the time of commencing suit on the contract of insurance involved in this case relates to the procedure to be followed in perfecting a claim of loss as distinguished from the substantive contract provisions relating to the coverage and policy limits.

Contracts of insurance are a type of commercial transaction affected with great public interest, easily distinguished from contracts relating to property generally.

The Court of Appeals for the Fifth Circuit arbitrarily took the position that in the case of *Galliher* v. *State Mutual Life Insurance Co.*, 150 Ala. 543, 43 So. 853 (1907), the Supreme Court of Alabama had erroneously assumed that

it was concerned with deciding which statute of limitations should apply in that case. The respondent, in its brief, repeats this assumption. The *Galliher* case is the only case that we have been able to find that is directly in point with the case at Bar, and it is simply the assumption of the pleader that the Alabama Supreme Court made an erroneous assumption. The decision of the court is definite, and since the State of Alabama has a statute paralelling that of Florida, it is evident that the Supreme Court of Florida would follow the decision of the Alabama court if a case under the same circumstances were presented to it.

The respondent and the Court of Appeals have attempted to place themselves in the position of the Supreme Court of Florida, and assume that the Supreme Court of Florida would make a finding which is contrary to Section 95.03 of the Florida Statutes, 1959.

We call the court's attention to the following statement taken from 6 Fla. Jur.—Conflict of Law—page 195, Sec. 12:

> "It is only by courtesy, comity and mutual convenience of nations, and yielding to the demands, that our courts sanction the admission and operation of foreign laws relative to contracts, and where the law of the place of contract and the law of the forum are in direct conflict, the comity of nations must yield to the positive law of the land."

The foregoing statement was referred to by the Florida Supreme Court in *Kellogg-Citizens National Bank* v. *Fulton*, 145 Fla. 68, 199 So. 60.

POINT 3.

The Respondent in Its Brief Takes the Position That the Lower Court Would Have Inevitably Entered a Finding of Non-Liability under the Policy Sued upon If It Had Been Unnecessary to Determine the Constitutional Questions Applicable to the One-Year Suit Clause.

The respondent has taken the position that a personal property floater (worldwide insurance policy) is an "Inland Marine Policy". The term "Inland Marine Policy" is a fiction of the insurance profession. The principal reason for purchasing an insurance contract of the sort described in the policy upon which suit was originally brought is to protect personal property of the insured against theft and malicious destruction; wherever the same may be located in the World; regardless of who is guilty of the theft or the act of malicious destruction.

The case at bar is for the recovery of money due the insured under the policy for property stolen from the insured by his wife, of property wantonly destroyed by her. The Florida Supreme Court recognized that a husband may steal from his wife, or a wife from her husband. *State* v. *Herndon*, 158 Fla. 115, 27 So.2d 833. The Court in the *Herndon* case held:

> "* * * it is not to be inferred from what has been said that in every case in which one spouse appropriates the property or funds of the other, may be classified as larceny * * * The element of intent must be one of the controlling factors in determining larceny. Here, as elsewhere, funds of one spouse, used by the other to purchase food and clothing or family necessities, would not be construed as larceny, but here the charge is for appropriating $5,000 of the wife's money. In the state of the law pointed out here, we think it necessarily fol-

lows that even spouses must observe the difference between mine and thine, and if they fail they do so at their peril."

The District Court recognized in the case at bar that under the law of Florida a wife can, in the instances where a wrongful intent is shown, steal from the husband, and so charged the jury (R. 25), and the jury, having taken into consideration the charge of the court, and the circumstances presented by the evidence, held that the case at bar met the requirements to the extent that larceny had been proven, and so returned a verdict against the respondent.

In view of the above cited case, it is submitted that the District Court would have had to utterly disregard the law of the State of Florida, and the findings of the Florida Supreme Court in order to have been able to support its findings because of a lack of coverage under the policy.

CONCLUSION.

It is respectfully submitted that the Court should reverse the decision of the Court of Appeals.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 349

JOHN CLAY,
Petitioner,

vs.

SUN INSURANCE OFFICE LIMITED,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF THE STATE OF FLORIDA, AMICUS CURIAE

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REPLY BRIEF OF THE STATE OF FLORIDA, AMICUS CURIAE

STATEMENT OF THE CASE

This brief is submitted on behalf of the State of Florida as Amicus Curiae by its Attorney General in reply to the respondent's brief. Amicus Curiae adopts the statement of the case and statement of facts as appear in its main brief.

ARGUMENT

THE FLORIDA STATUTE OF LIMITATION VOIDING ALL PROVISIONS "CONTAINED IN ANY CONTRACT WHATEVER" WHICH SHORTEN THE TIME TO SUE ON A CONTRACT CONTAINING SUCH PROVISIONS TO A PERIOD LESS THAN THAT PROVIDED BY FLORIDA STATUTES OF LIMITATION, APPLIES TO A CONTRACT OF

INSURANCE ISSUED IN ILLINOIS TO A CITIZEN OF ILLINOIS WHEN A LOSS COVERED BY SUCH CONTRACT OF INSURANCE OCCURS IN FLORIDA SUBSEQUENT TO THE INSURED BECOMING A FLORIDA RESIDENT.

The Legislature of the State of Florida has enacted laws regulating insurance business in the state, Title XXXV, Florida Statutes, 1959, none of which contain a specific statute of limitation applicable to the contract of insurance upon which this action is based.

The Florida Legislature enacted Chapter 6465, Laws of 1913, (A.7) now appearing, without amendment, as Section 95.03, Florida Statutes, 1959, voiding contract provisions which require the bringing of suit on any contract in a period of time shorter than that provided by Florida's statutes of limitation.

At the time of enacting the insurance laws of Florida, the Legislature is presumed to have done so with full knowledge of other laws of the state applicable to contracts of insurance. The Florida court has considered Section 95.03, Florida Statutes, applicable to contracts of insurance. *Caruthers v. Peninsular Life Ins. Co.*, 7 So. 2d 841, 1942, Text 842. In discussing said section, the court said:

> "The law not only declares such a (contractual) restriction illegal but proscribes effectuation of it by any court in this state. The simple language of the statute is a complete reply to this assertion of defendant in error."

Thus, no need then existed or presently exists for specific laws concerning limiting provisions appearing in contracts of insurance, unless the Legislature deems particular types of insurance policies should be required to be litigated within periods of time less than those provided under Florda's general statutes of limitation, Chapter 95, Florida Statutes.

If the interest of the forum is sufficient, neither the due

process nor the full faith and credit clause of the Federal Constitution require the forum to apply normal conflict of laws rule. Thus, the application of Section 95.03, Florida Statutes, turns on the sufficiency of the interest of the State of Florida. *Griffin v. McCoach*, 313 U. S. 498 (1941); *Hoopeston Canning Co. v. Cullen*, 318 U. S. 313 (1943); *McGee v. International Life Insurance Company*, 355 U. S. 220 (1957).

Florida presently enjoys the unique position of being one of the leading states in permanent population increase. Persons migrating to Florida intending to become permanent residents of this state undoubtedly bring with them personal property of inestimable value much of which is covered by world-wide personal property floater insurance policies containing provisions similar to those appearing in the policy of insurance giving rise to this case. Persons so situated have a right to look to the State of Florida and its laws for protection against technical language of insurance contracts which permit the insurer to void the insured's substantive rights under policies of insurance.

As a corollary to such rights, it is the position of the state that in its sovereign capacity it has a responsibility through its legislative, executive and judicial branches of government to assure such persons and their property its protection by enforcement of all applicable laws, including Section 95.03, Florida Statutes, 1959.

Section 95.03, Florida Statutes, presents a clear and concise legislative pronouncement of the public policy of the State of Florida which should not go unrecognized or held to be inapplicable to the case at bar.

No more cogent interest of a state exists than its responsibility to enforce its laws for the protection of its residents and their property and such protection should attach regardless of the duration of the residency. In those cases

where Section 95.03, Florida Statutes, has not been applied to contracts performed within the State of Florida, there has been either a preemption of the field by the Federal law or the contract involved a subject matter peculiarly affected by maritime interests. *Scheibel v. Aquilines, Inc.*, C.C.A. (2 Cir. 1946) 156 F. 2d 636; *J. B. Effenson Co. v. Three Bays Corporation, Ltd.*, C.A. (5 Cir. 1956) 238 F. 2d 611, but see *Hoagland v. Railway Express Agency*, 75 So. 2d 822 (1954).

A complete discussion of the application of a statute of limitation very similar to Section 95.03, Florida Statutes, to an out-of-state contract of insurance and perhaps a case more parallel to this controversy than any other appears in *Asel v. Order of United Commercial Travelers*, (Mo. 1946) 197 S.W. 2d 639. The highest court of the State of Missouri held the "commencement of action" limiting provisions in an out-of-state contract of insurance must give way to the public policy as expressed in a state statute, applicable to all contracts, which declared void contractual provisions either directly or indirectly limiting or intending to limit the time in which any suit or action could be instituted. See also *Hornick v. First Catholic Slovak Union of the United States of America*, (Kan. 1924) 224 P. 486; *Larson v. Lane*, (9 Cir. 1941) 124 F. 2d 121; *Order of United Commercial Travelers of America v. Meinsen*, (8 Cir. 1942) 131 F. 2d 176; *Trammel v. Brotherhood of Locomotive Firemen and Enginemen*, (Mont. 1953) 253 P. 2d 329.

In the case at bar the interests of the State of Florida are superior to the interests of any other state because public policy of the State of Florida, reflected by the legislative pronouncement of that policy appearing in Section 95.03, Florida Statutes, is involved; Florida was the place of performance of the contract; it was the place in which the cause of action arose; it was the state of the policyholder's domicile; the insurance company admitted to do business in Florida was subject to regulation of its

business by Florida; and finally, contracts of insurance are a type of commercial endeavor in which regulation in the public interest is essential.

CONCLUSION

The opinion on the appeal taken from the judgment of the District Court rendered by the United States Court of Appeals for the Fifth Circuit, dated April 8, 1959, construing Section 95.03, Florida Statutes, in such manner as to limit the applicability of said section to contracts is seriously prejudicial to the interests of the State of Florida in its attempts to regulate insurance on lives and property of citizens of Florida, and should be reversed.

Respectfully submitted,

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APPENDIX

Chapter 6465, Laws of 1913:

"AN ACT to Declare Illegal and Void Stipulations and Provisions in Contracts Fixing the Period of Time in Which Suits May Be Instituted Which Shall Be Less Than the Period of Time Fixed by the Statute of Limitations of This State.

"BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF FLORIDA:

"Section 1. That all provisions and stipulations contained in any contract whatever entered into after this Act shall become effective, fixing the period of time in which suits may be instituted under any such contract, or upon any matter growing out of the provisions of any such contract, at a period of time less than that provided by the statute of limitations of this State, are hereby declared to be contrary to the public policy of this State, and to be illegal and void.

"Section 2. That no court in this State shall give effect to any provision or stipulation of the character mentioned in Section 1 hereof.

"Section 3. This Act shall take effect upon becoming a law."

Approved May 26, 1913.

CERTIFICATE OF SERVICE

I, Robert J. Kelly, Assistant Attorney General of the State of Florida, do hereby certify that I have mailed true copies of this brief and appendix to Messrs. James A. Smith and Joe C. Brannen, 506 Ainsley Building, Miami, Florida, Mr. Eugene A. Leiman, 116 John Street, New York 38, New York, and Messrs. Bert Cotton, Leonard S. Dome, Hortense Mound, Rein, Mound & Cotton, attorneys for respondent, and to Gibson & Gibson, Paschal C. Reese, 209 South Olive Avenue, West Palm Beach, Florida, attorneys for petitioner, this ——— day of March, 1960.

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